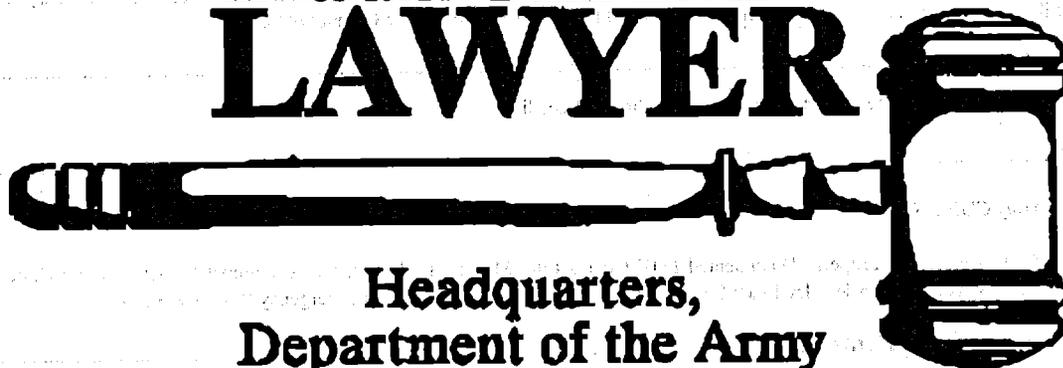


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Editor

Captain John B. Jones, Jr.

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Sexual Harassment and the Uniform Code of Military Justice: A Primer for the Military Justice Practitioner

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Introduction

Sexual harassment in the military is a controversial subject that has received a great deal of attention from the general public, the United States Congress, and the media.¹ This scrutiny has led to calls for reform in the way that the Department of Defense (DOD) prevents and responds to incidents of sexual harassment.² Among the suggested reforms is a proposal to amend the Uniform Code of Military Justice³ (UCMJ, or Code) to expressly prohibit conduct commonly referred to as sexual harassment.⁴ Whatever the ultimate outcome of these proposals, the military justice practitioner must operate under the UCMJ as it currently exists. Accordingly, counsel need to be familiar with the legal issues that may arise when verified allegations of sexual harassment are referred to trial by court-martial.

This article examines issues of substantive criminal law that are most likely to occur in this area and focuses on the ambiguities and new developments. After an introductory consideration of the criminal aspects of sexual harassment under the UCMJ, the article surveys the legal issues that may emerge when prosecuting sexual harassment—either as cruelty and maltreatment in violation of Article 93, UCMJ, or when charged as a violation of one or more of the remaining punitive articles.⁵ The article concludes with a summary of the substantive law in this area and provides recommendations for the military justice practitioner.

Criminal Aspects of Sexual Harassment

Department of Defense policy defines sexual harassment in the following manner:

Sexual harassment is a form of sexual discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; or
- (2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or
- (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment.⁶

The policy further provides that "[a]ny person in a supervisory of command position who uses or condones any form of sexual behavior to control, influence, or affect the career, pay, or

¹ See, e.g., Rick Maze, *Harassing Persists at Academies*, ARMY TIMES, May 1, 1995, at 8; Suzanne M. Schafer, *Sexual Remarks Appear to Doom Captain's Promotion*, WASH. POST, Apr. 25, 1995, at A-3; W. Hays Parks, *Tailhook: What Happened, Why, and What's to Be Learned*, NAVAL INST. PROC., Sept. 1994, at 89.

² See Parks, *supra* note 1, at 103.

³ 10 U.S.C. §§ 801-946 (1988) [hereinafter UCMJ].

⁴ See *United States v. Dear*, 40 M.J. 196, 197 n.* (C.M.A. 1994) (observing that the American Bar Association has called for the UCMJ to be amended to prohibit sexual harassment).

⁵ The term "punitive articles," as used in this article, refers to Articles 78 and 80-134, UCMJ, that prohibit various forms of misconduct and provide for punishment as a court-martial may direct.

⁶ Memorandum, Secretary of Defense, to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Inspector General of the Department of Defense, Director, Administration and Management, Directors of the Defense Agencies, subject: Prohibition of Sexual Harassment in the Department of Defense (DoD), 1 (22 Aug. 1994) [hereinafter DOD Policy Memorandum]; cf. DEP'T OF ARMY, REG. 600-20, PERSONNEL-GENERAL: ARMY COMMAND POLICY, para. 6-4a (30 Mar. 1988) (IO4, 17 Sept. 1993) [hereinafter AR 600-20]. For the purposes of this article, "quid pro quo" sexual harassment refers to verbal or physical conduct of a sexual nature when submission to such conduct is made, either explicitly or implicitly, a term or condition of a person's job, pay, or career, or when submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; "hostile environment" sexual harassment refers to unwelcome verbal or physical conduct of a sexual nature when this conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment.

job of a military member or civilian employee is engaging in sexual harassment."⁷

All the forms of sexual harassment described above are "strictly prohibited in the Armed Forces and the civilian work force."⁸ However, the practical effect of this prohibition may be unclear because neither the DOD policy nor the Army regulation implementing it are punitive (*i.e.*, a violation generally cannot serve as a basis for proceedings under the UCMJ).⁹ Furthermore, Congress has not expressly prohibited sexual harassment in the punitive articles of the UCMJ.¹⁰ In sum, although a practitioner initially might conclude that the UCMJ does not provide punitive sanctions for sexual harassment, this assumption would be incorrect.

The UCMJ provides a number of charging options to the commander seeking to dispose, by court-martial, of verified allegations of sexual harassment. These options fall primarily into two categories: the command can charge the accused with cruelty and maltreatment in the form of sexual harassment (which violates Article 93, UCMJ); or proceed by charging the specific "unwelcome verbal or physical conduct" (as violations of appropriate enumerated articles of the UCMJ).¹¹ The utility of either of these two approaches are fact specific and the next section will explore the inherent strengths and weaknesses of each approach.

Sexual Harassment as Cruelty and Maltreatment

Congress does not expressly prohibit sexual harassment in the punitive articles of the UCMJ.¹² However, Article 93, UCMJ, provides that "[a]ny person subject to this chapter who

is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct."¹³ Cruelty, oppression, or maltreatment of any person subject to one's orders arguably includes some forms of sexual harassment.¹⁴ The explanation of this offense found in the *Manual for Courts-Martial (Manual)* specifically observes that sexual harassment may constitute cruelty and maltreatment, and describes sexual harassment as "influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature."¹⁵ Furthermore, the various military appellate courts have repeatedly signalled their approval of the use of Article 93, UCMJ, to prosecute verified allegations of sexual harassment.¹⁶ Accordingly, when considering how to charge and prosecute a case involving sexual harassment, trial counsel may wish to first examine cruelty and maltreatment.

However, under certain circumstances, Article 93, UCMJ, may be limited in prosecuting sexual harassment; these potential limitations involve both the nature of the victim and the act. Unfortunately, the guidance provided by the *Manual* and the military appellate courts frequently has been ambiguous and sometimes contradictory.¹⁷ As a result of this confusion, the potential limitations of Article 93, UCMJ—for prosecuting verified allegations of sexual harassment—will be examined in more detail.

The Nature of the Victim

Article 93, UCMJ, prohibits an individual who is subject to the Code from maltreating, or being cruel or oppressive to,

⁷DOD Policy Memorandum, *supra* note 6, at 1.

⁸*Id.*

⁹See *United States v. Asfeld*, 30 M.J. 917 (A.C.M.R. 1990) (finding regulation that preceded *Army Regulation (AR) 600-20*, with very similar language, to be non-punitive).

¹⁰See generally UCMJ arts. 78, 80-134 (1988).

¹¹The command could choose, in appropriate circumstances, to proceed under both options. This approach is particularly viable in light of recent developments in the law of pleadings and multiplicity that allow prosecutors to properly charge and convict an accused for multiple offenses arising out of a single criminal transaction as long as either Congress intended that the offenses be separately punishable or, in the absence of clear evidence of legislative intent, that the elements of each offense require proof of a fact that the other does not. See *United States v. Teters*, 37 M.J. 370, 376-77 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994).

¹²See generally UCMJ arts. 78, 80-134 (1988).

¹³*Id.* art. 93.

¹⁴MANUAL FOR COURTS-MARTIAL, *United States*, pt. IV, ¶ 17c.(2) (1994 ed.) [hereinafter MCM].

¹⁵*Id.* The description of sexual harassment in the *Manual* differs significantly from that contained in DOD policy. Cf. *supra* note 6 and accompanying text.

¹⁶See, e.g., *United States v. Hullett*, 40 M.J. 189, 193 n.2 (C.M.A. 1994) (remarking that "under appropriate circumstances, sexually-oriented comments by a senior noncommissioned officer to a soldier junior in rank or position might constitute . . . a violation of Article 93, UCMJ"); *United States v. Dear*, 40 M.J. 196 (C.M.A. 1994) (affirming that maltreatment by sexual harassment states an offense); *United States v. Rutko*, 36 M.J. 798 (A.C.M.R. 1993) (affirming legal and factual sufficiency of evidence of maltreatment by sexual harassment).

¹⁷See *infra* notes 18-74 and accompanying text.

"any person subject to his orders."¹⁸ The phrase "any person subject to his orders" can be interpreted in a variety of ways. The *Manual* explains that "any person subject to his orders" includes the following:

not only those persons under the direct or immediate command of the accused but extends to all persons, subject to the code or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless whether the accused is in the direct chain of command over the person.¹⁹

Because the UCMJ generally requires an individual to obey the lawful orders of those superior in either command or rank,²⁰ the fair implication of the explanation in the *Manual* is that a victim is subject to the orders of the accused whenever the accused is superior in rank to the victim,²¹ regardless of the presence of a supervisory relationship between the two individuals. Judge Gierke of the United States Court of Appeals for the Armed Forces²² would appear to support this position when, writing for a sharply divided court in *United States v. Hullett*,²³ he recently asserted in dicta that "under appropriate circumstances, sexually-oriented comments by a

senior noncommissioned officer to a junior in rank or position might constitute . . . a violation of Article 93, UCMJ."²⁴

However, the CAAF has failed to unambiguously subscribe to such an expansive view of the meaning of "subject to his orders," and Judge Gierke's observation is seemingly inconsistent with the reasoning in a previous decision, *United States v. Curry*.²⁵ In *Curry*, the COMA considered the case of Yeoman First Class Curry, who was convicted of oppressing a petty officer—junior to Curry only in rank—by suggesting that she should give him "a head to toe body massage."²⁶ The COMA set aside Curry's conviction for violating Article 93, UCMJ, in part because they questioned whether the evidence was sufficient to establish that the victim was subject to the orders of the accused.²⁷ The COMA observed—notwithstanding the that the victim was junior in rank to the accused—that the victim "had no duty which required her to obey any orders of appellant. He lacked authority over her, and he did not try to order her to do anything."²⁸ The COMA remanded the case to the service court, which ultimately dismissed the charge and its specification.²⁹

This apparent reluctance to find a violation of Article 93, UCMJ, in the absence of a command or supervisory relationship, finds its clearest support in *United States v. Dickey*.³⁰

¹⁸UCMJ art. 93 (1988).

¹⁹MCM, *supra* note 14, pt. IV, ¶ 17c.(1); DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, para. 3-31.b. (1 May 1982) [hereinafter BENCHBOOK].

²⁰*See, e.g.*, MCM, *supra* note 14, pt. IV, ¶ 13c.(1)(a).

²¹This interpretation assumes that the victim and the accused are of the same armed service. If the accused and victim belong to different armed services, *see id.* ¶13c.(1)(b); *United States v. White*, 39 M.J. 796 (N.M.C.M.R. 1994).

²²On 5 October 1994, the United States Court of Military Appeals (COMA) was renamed the United States Court of Appeals for the Armed Forces (CAAF), and each service court of military review was renamed as a court of criminal appeals. For the purpose of this article, each court will be referred to by the name by which it was known at the time the decision in question was rendered. *Accord* *United States v. Sanders*, 41 M.J. 485, 485 n.1 (1995).

²³40 M.J. 189 (C.M.A. 1994).

²⁴*Id.* at 193 n.2 (emphasis added).

²⁵28 M.J. 419 (C.M.A. 1989).

²⁶*Id.* at 423.

²⁷*Id.* at 424.

²⁸*Id.*

²⁹*United States v. Curry*, No. 88-0719R, 1991 CMR Lexis 1144, at *5 (N.M.C.M.R. July 31, 1991). The Navy-Marine Corps Court of Military Review, in its unpublished opinion on remand, determined that "even though the victim was subordinate in rank to the appellant and may have needed to deal with the appellant [in the course of her duty] . . . such transitory contact did not, per se, establish 'some duty' of the victim to obey the appellant." *Id.* at *4.

³⁰20 C.M.R. 486 (A.B.R. 1956). The most recent example is apparently *United States v. McCreight*, 39 M.J. 530 (A.F.C.M.R. 1994). In *McCreight*, the Air Force Court of Military Review (AFCMR) reviewed the conviction of an officer for unbecoming conduct in the form of cruelty and maltreatment by engaging in sexual intercourse with a female airman, not under his command or supervision, but who was married to an airman under the supervision of the accused. *Id.* at 534. The appellant asked the AFCMR to set aside his conviction because "the evidence does not show any command or duty relationship between [appellant and the victim] . . . that would satisfy the 'subject to the orders' element of the offense." The AFCMR observed that the appellant's argument was "an interesting issue with almost no case law on point," but declined to decide the case on that issue. *Id.*

The accused, commander of a United States Army unit in Korea, was responsible for the general supervision of the work of certain Korean nationals, including the victim, within the compound on which the unit was located.³¹ Dickey was charged and convicted of maltreatment for instructing subordinates to have their guard dogs attack the victim without justification.³² In an opinion affirming Dickey's conviction, the Army Board of Review declared that "[w]e are of the opinion that the purpose of Article 93 is to prevent persons subject to the Code who are in a command capacity from maltreating those under their supervision."³³ This narrow interpretation of the prohibitions of Article 93, UCMJ, stands in contrast to the expansive view of "subject to his orders" found in the *Manual*,³⁴ and thereby creates a significant degree of uncertainty for the practitioner as to the meaning of "subject to his orders." In light of this uncertainty, counsel should be mindful of the rule of lenity, a rule of statutory construction which provides that in cases where ambiguity in statutory text exists, and reasonable minds could differ as to its meaning, the phrase in question shall be given the interpretation in favor of a criminal accused.³⁵ Application of the rule to this case would seem to limit the meaning of "subject to his orders" as contained in Article 93, UCMJ, to those individuals supervised in some direct way by the accused.

Nature of the Act

The *Benchbook* defines cruelty, oppression, and maltreatment as "unwarranted, harmful, abusive, rough, or other unjustifiable treatment which, under all the circumstances . . . results in physical or mental pain or suffering, and . . . is unwarranted, unjustified and unnecessary for any lawful purpose."³⁶ While the *Benchbook* specifically excludes from this definition "[t]he imposition of necessary or proper duties on a soldier and the requirement that those duties be performed,"³⁷ it provides little useful guidance to the practitioner as to what state of mind must be possessed by the accused to establish the offense, or what renders a particular actus reus "unwarranted, unjustified and unnecessary for any lawful purpose."³⁸

The AFCMR considered these related ambiguities in *United States v. Hanson*.³⁹ Captain Hanson was charged with unbecoming conduct in the form of cruelty and maltreatment to subordinates. He had engaged in vulgar and abusive banter with his subordinates for over two years.⁴⁰ At trial and on appeal, the accused contended that the remarks in question were not intended to be abusive or embarrassing, but rather were efforts at humor and to establish an informal relationship with his subordinates.⁴¹ In affirming Hanson's conviction, the

³¹ Dickey, 20 C.M.R. at 487.

³² *Id.*

³³ *Id.* at 489 (emphasis added). The board described the indicia of control, beyond that of mere rank, that led them to the conclusion that the victim was subject to the orders of the accused: the victim lived in an area controlled by the accused; the accused could designate the location and duration of the victim's work assignments; and the accused had restricted the activities of the victim prior to directing the attack by the guard dogs. *Id.* The board did not, however, cite any specific legislative history in support of its analysis and conclusion concerning the purpose of Article 93, UCMJ. This omission undoubtedly results from there being little useful legislative history on the offense of cruelty and maltreatment generally, and none on the meaning of the phrase "subject to his orders." See Uniform Code of Military Justice: Hearings Before a Subcomm. of the House Comm. on Armed Services on H.R. 2498, 81st Cong., 1st Sess. 1227 (1949), reprinted in 1 INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE 695 (1950).

³⁴ This narrow interpretation also stands in contrast to the *Military Judges' Benchbook (Benchbook)*. See BENCHBOOK, *supra* note 19, para. 3-31.

³⁵ When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. . . . It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of harsher punishment.

Bell v. United States, 349 U.S. 81, 83 (1954) (Frankfurter, J.). *But cf. Callanan v. United States*, 364 U.S. 587, 596 (1960) ("The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary.")

³⁶ BENCHBOOK, *supra* note 19, para. 3-31.b. Reference to the *Benchbook* is necessary because neither Article 93, UCMJ, nor the *Manual* provide any meaningful explanation of what is meant by "cruelty," "oppression," or "maltreatment" in their text.

³⁷ *Id.*

³⁸ The *Benchbook* provides that the purpose and results of the treatment in question are to be evaluated under a totality of the circumstances. See *id.*

³⁹ 30 M.J. 1198 (A.F.C.M.R.), *aff'd*, 32 M.J. 309 (C.M.A. 1990), *cert. denied*, 500 U.S. 933 (1991).

⁴⁰ *Id.* at 1200.

⁴¹ *Id.*

AFCMR observed that the offense of cruelty and maltreatment is a general intent crime; the AFCMR reasoned that "[t]he essence of the offense is not necessarily dependent on what a military superior may intend by words or acts."⁴² An accused need only intend the act in question, or in the alternative, act with the knowledge that the act contemplated is substantially certain to result in unjustified physical or mental pain or suffering.⁴³

The next question raised by this analysis is "What constitutes 'physical or mental pain or suffering?'" When determining whether "physical or mental pain or suffering" has occurred, an objective standard,⁴⁴ that considers the totality of the circumstances surrounding the alleged cruelty or maltreatment, is applied.⁴⁵ However, the military appellate courts have provided minimal guidance to the military justice practitioner as to the meaning of this deceptively simple standard. For example, in *United States v. McCreight*,⁴⁶ the AFCMR wrestled with the meaning of "physical or mental pain and suffering." First Lieutenant McCreight was charged with, and convicted of, unbecoming conduct in the form of cruelty and maltreatment by engaging in sexual intercourse with a female airman; the victim was the spouse of a subordinate of

McCreight.⁴⁷ On appeal, the AFCMR found the evidence to be factually insufficient to sustain a finding of guilt, and set aside McCreight's conviction.⁴⁸ The AFCMR reasoned that there was no credible evidence to indicate that McCreight had threatened the victim to engage in intercourse with her; to the contrary, the AFCMR noted that the victim had made advances toward McCreight on at least one occasion, and did not seem "concerned" when the accused was left at her apartment late one night.⁴⁹

A logical implication derived from *McCreight* is that whereas cruelty and maltreatment must cause real (*i.e.*, objectively cognizable) injury to violate Article 93, UCMJ, a conviction may not lie in the absence of a subjective complaint.⁵⁰ Although this conclusion is consistent with the military case law concerning related forms of misconduct,⁵¹ it would seemingly have the effect of allowing a subordinate to ratify objectively cruel or oppressive conduct by a superior simply by consenting to the misuse of military authority. This somewhat irrational outcome overlooks the institutional interest in preserving integrity in the execution of military authority that is inherently protected by Article 93, UCMJ.⁵²

⁴² *Id.* at 1201; *cf.* *United States v. Hullett*, 40 M.J. 189 (C.M.A. 1994) (Sullivan, C.J., dissenting) (opining that accused should not be able to escape criminal liability for sexual remarks because "[t]he remark in question was a common joke").

⁴³ There apparently is no more precise description of general intent to be found in the case law pertaining to Article 93, UCMJ. For an example of the typical treatment of the intent required to establish cruelty, oppression, or maltreatment, see *United States v. Piatt*, 17 M.J. 442, 445 (C.M.A. 1984); *cf.* ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 834-35 (3d ed. 1982) ("Intent includes those consequences which (a) represent the very purpose for which an act is done (regardless of likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire") (footnote omitted)).

⁴⁴ MCM, *supra* note 14, pt. IV, ¶17.c.(2). In an employment discrimination context, the United States Supreme Court has concluded that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Harris v. Forklift Sys.*, 114 S. Ct. 367, 370 (1993).

⁴⁵ See BENCHBOOK, *supra* note 19, para. 3-31.b.

⁴⁶ 39 M.J. 530 (A.F.C.M.R. 1994), *petition for rev. granted in part*, 41 M.J. 121 (C.M.A. 1994).

⁴⁷ *Id.* at 532.

⁴⁸ *Id.* at 534.

⁴⁹ *Id.* However, that AFCMR apparently disregarded testimony by the victim that McCreight "threatened to hurt Airman SB's [McCreight's subordinate/victim's husband] performance ratings and pending assignment unless she had sex with him." *Id.* at 532.

⁵⁰ *Cf.* *Harris v. Forklift Sys.*, 114 S. Ct. 367 (1993); DOD Policy Memorandum, *supra* note 6, at 1 ("[W]orkplace conduct, to be actionable as 'abusive work environment' harassment, need . . . only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or abusive.") (emphasis added). However, a victim's complaint may be less relevant or necessary when prosecuting allegations of quid pro quo sexual harassment than in cases involving allegations of a hostile work environment.

⁵¹ See, e.g., *United States v. Hullett*, 40 M.J. 189 (C.M.A. 1994); see also *infra* notes 94-98 and accompanying text for a discussion of the effect that the absence of a subjective complaint may have on a prosecution of misconduct under Article 134, UCMJ.

⁵² The degree to which the *McCreight* rationale disregards the institutional values protected by Article 93, UCMJ, becomes evident if one considers its application to a hypothetical not involving sexual harassment. For example, consider the squad leader who conducts an initiation ceremony for new soldiers assigned to his unit; assume that the initiation ceremony involves the intentional infliction of objectively cognizable cruelty in the form of mental suffering on the new arrivals. The squad leader's conduct would appear to fall squarely in the textual prohibitions of Article 93, UCMJ, but a hasty application of the AFCMR's holding in *McCreight* to these facts might allow the potential accused to avoid prosecution if the participation of the initiates was procured by something less than threats. See *McCreight*, 39 M.J. at 534. This apparent discrepancy could be explained in that the court in *McCreight* failed to adequately distinguish between the two types of sexual harassment within the ambit of Article 93, UCMJ: quid pro quo or hostile environment. The presence or absence of a threat may be relevant to establishing whether quid pro quo harassment has taken place, but is less relevant in determining whether or not a hostile environment exists in a given workplace. Practitioners should be precise in identifying the particular method of harassment to ensure that the decision of the trier of fact is based on the correct legal standard.

There is some tension between the rationale in *McCreight* and that found in the United States Supreme Court precedent involving sexual harassment. In *Meritor Savings Bank v. Vinson*,⁵³ the Supreme Court reviewed a claim of hostile environment sexual harassment that gave rise to a civil lawsuit alleging sexual discrimination in violation of Title VII of the federal employment discrimination statute.⁵⁴ The district court had found no actionable harassment, at least in part because the victim had engaged in a "voluntary... intimate or sexual relationship" with the individual alleged to have harassed her;⁵⁵ the Supreme Court disagreed and affirmed the decision of the court of appeals remanding the case to the district court.⁵⁶ The Court reasoned as follows: "[T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'... The correct inquiry is whether [the victim]... by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."⁵⁷

One could argue that the Court's reasoning in *Vinson* is merely persuasive authority, involving a civil lawsuit alleging employment discrimination, and not controlling on the military justice system. While technically correct, this position overlooks the similarities between the definition of sexual

harassment in Title VII's implementing regulations, and that contained in the DOD policy and the implementing regulations of the various services; they are virtually identical.⁵⁸ As a result of this similarity, the appropriate threshold inquiry should be the same whether proceeding under Title VII or Article 93, UCMJ; was there verbal or physical conduct of a sexual nature that was somehow unwelcome? *McCreight* failed, however, to explicitly address this issue, and thus fell into the same trap as did the district court in *Vinson*, by focusing instead on the eventual voluntariness of the victim's actions. Military justice practitioners should not make the same mistake, and should temper any reliance on *McCreight* with an awareness that *Vinson* and its progeny provide a better conceptual framework for analyzing the conduct of the victim in cases involving sexual harassment.⁵⁹

The reasonableness of the victim's perceptions of harassing behavior is extremely important in cases alleging a hostile work environment.⁶⁰ Under the federal employment discrimination statute, a workplace may be considered a "hostile environment" only if it "would reasonably be perceived, and is perceived, as hostile or abusive."⁶¹ In *Harris v. Forklift Systems*,⁶² the Supreme Court described a nonexclusive list of factors that can be considered in determining whether an environment can reasonably be perceived as hostile or abusive, including: the frequency and severity of the conduct; whether the conduct was "physically threatening or humiliating"; and whether the conduct "unreasonably interferes with an employee's work performance."⁶³ Unfortunately, little criminal precedent is available for the practitioner in determining what conduct can reasonably be perceived as hostile or abusive. In *United States v. Hanson*,⁶⁴ the AFCEMR observed that not all

⁵³477 U.S. 57 (1986).

⁵⁴Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988).

⁵⁵*Vinson*, 477 U.S. at 61 (citations and footnotes omitted).

⁵⁶*Id.* at 73.

⁵⁷*Id.* at 68 (emphasis added) (citations omitted). The Court observed that "[w]hile 'voluntariness' in the sense of consent is not a defense to such a claim [of sexual harassment], it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome." *Id.*

⁵⁸Compare DOD Policy Memorandum, *supra* note 6, at 1, with 29 C.F.R. § 1604.11(a) (1994).

⁵⁹The outcome in *McCreight* would likely have been the same regardless of the analysis applied. Evidence of a consensual sexual relationship between the accused and the putative victim arguably would be relevant in determining whether the verbal or physical conduct of a sexual nature that is in question was, in fact, unwelcome. See *Vinson*, 477 U.S. at 57. The Supreme Court also has expressly noted that, in the Title VII context, "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Harris v. Forklift Sys.*, 114 S. Ct. 367, 370 (1993).

⁶⁰See *supra* note 50.

⁶¹*Harris*, 114 S. Ct. at 371 (citing *Vinson*, 477 U.S. at 67).

⁶²*Id.* at 367.

⁶³*Id.* at 371.

⁶⁴30 M.J. 1198 (A.F.C.M.R.), *aff'd*, 32 M.J. 309 (C.M.A. 1990), *cert. denied*, 500 U.S. 933 (1991).

offensive conduct will be objectively cognizable as cruelty, oppression, or maltreatment.⁶⁵ The AFCMR remarked, in oft quoted⁶⁶ dicta, that "[a] certain amount of banter and even profanity in a military office is normally acceptable and, even when done in 'poor taste,' will only rarely rise to the level of criminal misconduct."⁶⁷ However, this general observation provides little guidance for the practitioner to determine what conduct may reasonably be considered to be cruel, oppressive, or amounting to maltreatment.⁶⁸ The absence of a helpful instruction in the *Benchbook* exacerbates the challenging effects of the shortage of applicable military precedent in this area.⁶⁹ As a result, counsel facing these issues at trial should fashion an appropriate instruction based on *Vinson and Hanson* to aid the trier of fact in determining the reasonableness of a victim's perception that sexual harassment has occurred.⁷⁰

The foregoing analysis is less useful when the practitioner confronts a case involving sexual harassment of the quid pro quo variety; one could conclude that the perception of the victim is irrelevant when submission to, or rejection of, verbal or physical conduct of a sexual nature affects a person's job, pay, or career, or is used as a basis for career or employment decisions affecting that person. Instead, the relevant analysis in this situation is whether the accused influenced, offered to

influence, or threatened the career, pay, or job of another person in exchange for sexual favors.⁷¹ This conduct arguably amounts to maltreatment or cruelty even in the absence of complaint by the subordinate.⁷² However, the instructions contained in the *Benchbook* do not make this distinction; the relevant instructions appear to require that the conduct in question cause "physical or mental pain or suffering" to violate Article 93, UCMJ.⁷³ Consequently, the practitioner will again be forced to draft proposed instructions for the trier of fact that more accurately describe what conduct actually constitutes quid pro quo sexual harassment.⁷⁴

Alternatives to Article 93, UCMJ

Article 93, UCMJ, generally will provide an effective basis for prosecuting individuals who have sexually harassed persons subject to their orders. Its utility is most problematic, however, in circumstances involving a victim who either does not complain of the conduct in question,⁷⁵ or is not in the direct chain of command of the accused.⁷⁶ Moreover, an accused found guilty of cruelty or maltreatment can only receive a maximum punishment of confinement for one year, forfeiture of all pay and allowances, and dismissal or dishonorable discharge.⁷⁷ These limitations may create situations in

⁶⁵ *Id.* at 1201.

⁶⁶ *See, e.g.,* United States v. Hullett, 40 M.J. 189, 193 (C.M.A. 1994).

⁶⁷ *Hanson*, 30 M.J. at 1201. The AFCMR also noted that what might be objectively unreasonable conduct in one circumstance may be acceptable in another: "what is condoned in a professional athlete's locker room may well be highly offensive in a house of worship." *Id.* Whether the AFCMR considers the average military workplace to be closer to a locker room or a house of worship is unclear. *Cf. Hullett*, 40 M.J. at 189 (setting aside conviction for indecent language, in part, because "sexual joking and banter were 'nothing unusual' in the section").

⁶⁸ It has been proposed that the *Hanson* dicta be used as an instruction for the trier of fact in appropriate circumstances at courts-martial. *See* U.S. Army Trial Defense Service, Training Memorandum 92-3, 7 (Mar. 1992). Arguably, this instruction would not be helpful to the trier of fact in resolving whether an individual's perception of cruelty, oppression, or maltreatment was reasonable, and would be frighteningly reminiscent of the notorious "cautionary instruction" traditionally given in rape cases.

⁶⁹ *See* BENCHBOOK, *supra* note 19, para. 3-31.b.

⁷⁰ Such an instruction could read as follows:

You are advised that deliberate or repeated comments or gestures of a sexual nature amount to sexual harassment if, under all the circumstances, an individual subject to the orders of the accused reasonably perceived that the conduct was cruel or abusive. The factors that you may consider in determining whether the perception of cruelty or abusive conduct was reasonable include, but are not limited to, the frequency and severity of the conduct, whether the conduct was physically threatening or humiliating, and whether the conduct interfered with the employee's work performance.

⁷¹ MCM, *supra* note 14, pt. IV, ¶ 17.c.(2); BENCHBOOK, *supra* note 19, para. 3-31.b.

⁷² *See supra* note 50.

⁷³ BENCHBOOK, *supra* note 19, para. 3-31.b.

⁷⁴ Such an instruction could read as follows:

If you find that the accused influenced, offered to influence, or threatened the career, pay, or job of another person in exchange for sexual favors, you may then infer that such conduct amounted to cruelty, oppression, or maltreatment.

⁷⁵ *See supra* notes 50-59 and accompanying text.

⁷⁶ *See supra* notes 19-35 and accompanying text.

⁷⁷ MCM, *supra* note 14, pt. IV, ¶ 17.e.

which an individual may be found not guilty of violating Article 93, UCMJ, or, if convicted, receives a punishment that is inappropriately lenient in light of the conduct in question.⁷⁸ As a result, counsel may, in appropriate cases, choose to charge additional offenses other than, or in addition to,⁷⁹ cruelty and maltreatment. This portion of the article will examine other substantive crimes that are commonly associated with misconduct characterized as sexual harassment and is not intended as an exhaustive survey of the law in this area.⁸⁰ The remainder of this article will focus on aspects of the law that may present a stumbling block to the unwary practitioner.

Indecent Language

Unwelcome verbal conduct of a sexual nature may constitute sexual harassment if "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment."⁸¹ Furthermore, "deliberate or repeated offensive comments of a sexual nature" also may amount to cruelty, oppression, or maltreatment in violation of Article

93, UCMJ.⁸² This verbal conduct also may be separately punishable under the UCMJ if the speech is indecent.⁸³ Alternatively, certain speech may not qualify as sexual harassment, but nonetheless be prohibited because it is indecent.⁸⁴ However, recent case law has highlighted some limitations in applying the offense of indecent language to situations that may be commonly perceived as sexual harassment.

In *United States v. Hullett*,⁸⁵ the COMA considered the legal sufficiency of the evidence supporting an accused's conviction for communicating indecent language to a female soldier in his place of duty. The evidence at trial established⁸⁶ that the accused told the victim more than once that if she "gave him a chance, he'd make . . . [her] eyes roll in the back of . . . [her] head and . . . [her] toes curl under."⁸⁷ The COMA focused its attention on two elements of the offense: the indecency of the language itself, and its prejudicial or service discrediting effects. In setting aside the accused's conviction, the COMA found that no rational trier of fact could have found proof of these elements beyond a reasonable doubt.⁸⁸

⁷⁸It has been argued that to "label" misconduct that violates one or more of the punitive articles of the UCMJ as sexual harassment is misleading and "would tend to trivialize the seriousness of . . . these offenses and to minimize the impact that sexual harassment has on individuals and the workplace." Information Paper, Office of The Judge Advocate General, U.S. Army, DAJA-AL, subject: Sexual Harassment (4 Aug. 1994). Among the implicit assumptions in this conclusion is that cruelty and maltreatment in the form of sexual harassment is somehow less culpable misconduct than other violations of the punitive articles. Whatever the ultimate merits of this position, it is true to the extent that one considers the maximum period of confinement that may be imposed on an individual found guilty of cruelty or maltreatment; a maximum punishment of one year of confinement arguably does "trivialize" the offense of cruelty and maltreatment of subordinates. One could, however, analogize cruelty and maltreatment of subordinates to the various disrespect offenses under the UCMJ that protect superiors from the conduct of subordinates. For example, disrespect to a superior commissioned officer has a maximum punishment of confinement for one year, total forfeitures, and a bad-conduct discharge. MCM, *supra* note 14, pt. IV, ¶ 13.e. In this light, subordinates could be said to actually receive more protection under Article 93, UCMJ, from the cruel or oppressive actions of superiors than do superiors from the disrespectful actions of subordinates. However, this relative parity of maximum punishments between offenses does not change the fact that cruelty and maltreatment reasonably could be considered a "minor offense" under the UCMJ. See *id.* pt. V, ¶ 1.e. If the offense of cruelty and maltreatment is too "trivial" merely because of its punishment ceiling, the President could certainly exercise his statutory powers to increase the maximum punishment that could be imposed for violations of Article 93, UCMJ, that amount to sexual harassment. See UCMJ art. 56 (1988). Additionally, counsel are not necessarily restricted to charging only cruelty and maltreatment; one may generally be charged with multiple offenses arising out of a single criminal transaction as long as the offenses are "separate," see *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994), and probable cause exists to believe that the accused committed the offense. AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION STANDARD 3-3.9, at 70-71 (3d ed. 1993). Multiple criminal convictions are not likely to be considered a trivial sanction by anyone.

⁷⁹An individual may be properly charged and convicted of multiple offenses arising from the same criminal transaction as long as each offense requires proof of a fact that the other does not, and there are no legislative restrictions that prevent multiple convictions. See *Teters*, 37 M.J. at 370.

⁸⁰Military justice practitioners or supervisors who need a more comprehensive survey of the punitive articles of the UCMJ should consult either CRIM. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 337, CRIMES AND DEFENSES DESKBOOK (July 1994), or DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE ch. 2 (3d ed. 1992).

⁸¹See DOD Policy Memorandum, *supra* note 6, at 1.

⁸²See MCM, *supra* note 14, pt. IV, ¶ 17.b.(2); BENCHBOOK, *supra* note 19, para. 3-31.b.

⁸³See MCM, *supra* note 14, pt. IV, ¶ 89.

⁸⁴See *id.*

⁸⁵40 M.J. 189 (C.M.A. 1994).

⁸⁶A court reviewing the legal sufficiency of the evidence in a given case views the evidence in the record in the light most favorable to the prosecution. *Id.* at 191 (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).

⁸⁷*Id.* at 190.

⁸⁸See *id.* at 193 & n.2.

The COMA treated the remarks of the accused as a suggestion to the adult victim "that they have a sexual relationship,"⁸⁹ a suggestion that the COMA concluded did not violate the standards of the military community for determining whether language is indecent.⁹⁰ The COMA further observed that sexual joking and banter were common in the accused's section, and that the remarks were "privately communicated on a military installation;"⁹¹ as such, there could be no discredit to the service or prejudicial effects on good order and discipline.⁹²

Hullett provides a number of lessons for the practitioner, but two points are particularly relevant. The determination as to whether certain speech is indecent should not be made solely by referring to a subjective standard of indecency, or even by relying on the definitions of indecency contained in the *Manual* or the *Benchbook*.⁹³ Instead, counsel must explore the case law in advance of the charging decision to determine whether military appellate courts have held the language to be indecent.

At the same time, counsel must ascertain what effect the language in question has had on the reputation of the armed forces or its good order and discipline. In *Hullett*, the COMA

placed significant weight on the fact that sexual banter and joking were common in the accused's section in making its determination that there was no prejudicial effect from the conduct of the accused.⁹⁴ One could argue, however, that the relevant inquiry is not whether there has been prejudicial effect on the good order and discipline of a particular unit, but instead whether there has been "prejudice of good order and discipline in the *armed forces*."⁹⁵ While it is unlikely that reasonably direct and palpable prejudice to the good order and discipline of the armed forces would occur without some prejudice to a particular unit, the military justice practitioner should not unnecessarily restrict the search for prejudicial effect to the specific unit of the accused.⁹⁶ Similarly, the language in question arguably need only have "a tendency to bring the service into disrepute or . . . tend to lower it in the public esteem;"⁹⁷ however, the military appellate courts have tended to require observation or knowledge by the public of the discreditable conduct to sustain a conviction for this type of misconduct.⁹⁸

Other Speech-Related Offenses

Counsel may encounter situations in which the verbal conduct in question is not indecent, but is still discreditable or

⁸⁹*Id.* at 191-92.

⁹⁰*Id.* at 191.

⁹¹*Id.* at 193.

⁹²*Id.* at 192.

⁹³Practitioners should be particularly wary of relying solely on the definitions of indecency contained in the *Manual*, the *Benchbook*, and memoranda issued by the United States Army Trial Judiciary because significant differences exist. The *Manual* and the *Benchbook* agree that "[i]ndecent language is that which is grossly offensive to the community sense of modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought." *BENCHBOOK*, *supra* note 19, para. 3-158; *accord* MCM, *supra* note 14, pt. IV, ¶ 89.c. In contrast, the United States Army Trial Judiciary defines indecent language as:

that which is grossly offensive to the community sense of modesty, decency, or propriety or shocks the moral sense of the community because it conveys a libidinous message; that is, a lustful, lewd, or salacious connotation, either expressly or by implication from the circumstances under which it was spoken. The test is whether the particular language employed is calculated to corrupt morals or excite libidinous thoughts, and not whether the words themselves are impure.

Memorandum, Chief Trial Judge, U.S. Army Trial Judiciary, to All Chief Circuit and Circuit Judges, subject: U.S. Army Trial Judiciary Benchbook Update Memo 2, para. 3-158.d (4 Feb. 1993) (Update Memo). While the Update Memo appears to require some intent to "corrupt morals or excite libidinous thoughts" on the part of the speaker, and the *Manual* and *Benchbook* definitions do not contain this language, all sources purport to rely on the same authority. *Compare id.* para. e with MCM, *supra* note 14, at A21-104. Because the COMA has expressly held that the standard described in the Update Memo is "an appropriate determination for indecent language," *United States v. French*, 31 M.J. 57, 61 (C.M.A. 1990), one could conclude that the Update Memo is a more accurate, or at least comprehensive, statement of the law than that contained in either the *Manual* or *Benchbook*.

⁹⁴*Hullett*, 40 M.J. at 192-93.

⁹⁵UCMJ art. 134 (1988) (*emphasis added*). *Cf. Hullett*, 40 M.J. at 193 (Wiss, J., concurring in the result) (opining that the appropriate standard for gauging indecency is the military community, not the standard of a particular unit).

⁹⁶*Cf. id.* at 194-95 (Sullivan, C.J., dissenting) ("In today's Army, no junior soldier should have to put up with such remarks and appellant should not be excused from the consequences of his remark because, as the lead opinion puts it, 'The remark in question was a common joke.'").

⁹⁷MCM, *supra* note 14, pt. IV, ¶ 60.c.(3).

⁹⁸*See, e.g., United States v. Guerrero*, 33 M.J. 295, 298 (C.M.A. 1991), *cert. denied*, 502 U.S. 1096 (1992); *United States v. Kirksey*, 20 C.M.R. 272 (C.M.A. 1955). *But cf. United States v. Sullivan*, 38 M.J. 746 (A.C.M.R. 1993) (affirming conviction for discreditable conduct in absence of any evidence that victims knew of military status of accused).

prejudicial to the good order and discipline of the armed forces. While there is no generic "offensive language" offense under the UCMJ,⁹⁹ verbal conduct may nonetheless be illegal if it amounts to provoking speeches or gestures¹⁰⁰ or disorderly conduct.¹⁰¹ Either offense, or even both, may be appropriate in a given situation, but both contain significant limitations that may preclude their use in prosecuting allegations of sexual harassment.

Article 117, UCMJ, prohibits military personnel from using, in the presence of the person to whom they are directed, "provoking or reproachful words or gestures."¹⁰² This verbal misconduct need only be that "which a reasonable person would expect to induce a breach of the peace under the circumstances,"¹⁰³ and the government need not prove that it is either discreditable to the armed forces or prejudicial to their good order and discipline.¹⁰⁴ However, the protections of Article 117 extend only to persons subject to the UCMJ,¹⁰⁵ thereby limiting its application to those situations involving military victims.

Disorderly conduct may present a charging alternative to provoking speeches and gestures in that its protections are not limited to military victims.¹⁰⁶ The *Manual* describes the offense as "conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be dis-

turbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character."¹⁰⁷ Proof of the discreditable nature of the conduct or its prejudicial effect on the good order and discipline of the armed forces is necessary,¹⁰⁸ although an accused is subject to additional punishment if the service-discrediting nature of the conduct is expressly pleaded and proven at trial.¹⁰⁹

Disposition and Punishment of Speech Offenses

Indecent language, disorderly conduct, and provoking speeches and gestures are ordinarily considered "minor offenses" under the UCMJ,¹¹⁰ and, therefore, may be appropriate for disposition under nonjudicial punishment rather than court-martial.¹¹¹ However, a commander may decide, in light of the nature of the offense, the circumstances surrounding its commission, or the age, rank, and duty assignment of the accused, that an otherwise minor offense should be tried by court-martial.¹¹² In any case, minor charges generally can be joined with other, more serious offenses for a single trial in the discretion of the convening authority.¹¹³ As a result, the military justice practitioner confronting a case of sexual harassment involving verbal conduct should recognize the wide range of potential dispositions and punishment available to the command.

⁹⁹ See *United States v. Herron*, 39 M.J. 860, 863 (N.M.C.M.R. 1994).

¹⁰⁰ UCMJ art. 117 (1988).

¹⁰¹ MCM, *supra* note 14, pt. IV, ¶ 73.

¹⁰² *Id.* ¶ 42.c.(1).

¹⁰³ *Id.* See e.g., *United States v. Linyear*, 3 M.J. 1027 (N.M.C.M.R. 1977), *petition for rev. denied*, 5 M.J. 269 (C.M.A. 1979) (affirming "swine" uttered to female marine as provoking word).

¹⁰⁴ See *United States v. Foster*, 40 M.J. 140, 143 (C.M.A. 1994).

¹⁰⁵ UCMJ art. 117 (1988).

¹⁰⁶ See MCM, *supra* note 14, pt. IV, ¶ 73.

¹⁰⁷ *Id.* ¶ 73.c.(2).

¹⁰⁸ See *Foster*, 40 M.J. at 143.

¹⁰⁹ MCM, *supra* note 14, pt. IV, ¶ 73.c.(3), e.(1).

¹¹⁰ The *Manual* provides, in relevant part, that "[o]rdinarily, a minor offense is an offense which the maximum sentence impossible [sic] would not include a dishonorable discharge or confinement for longer than 1 [one] year if tried by general court-martial." *Id.* pt. V, ¶ 1.e. The maximum punishment that may be imposed for provoking speeches and gestures is confinement for six months and forfeiture of two-thirds pay per month for six months. *Id.* pt. IV, ¶ 42.e. The maximum punishment that may be imposed for disorderly conduct ranges from confinement for four months and forfeiture of two-thirds pay per month for four months if the conduct is pleaded and proven to be service discrediting, to confinement for one month and forfeiture of two-thirds pay for one month in other cases. *Id.* pt. IV, ¶ 73.e.(1).

¹¹¹ See *id.* pt. V, ¶ 1.e.

¹¹² *Id.*; cf. *id.* R.C.M. 306(b) discussion (setting out factors to guide the commander's decision for initial disposition of offenses).

¹¹³ *Id.* R.C.M. 601.(e)(2).

The General Article

The limitations of the offenses described above may lead a trial counsel to consider proceeding against an individual accused of unwelcome verbal or physical contact of a sexual nature under the so-called general article, Article 134, UCMJ.¹¹⁴ While the general article may not be used to prosecute a capital offense or conduct otherwise prohibited by the punitive articles of the UCMJ,¹¹⁵ its facially expansive prohibition of all conduct that is either service discrediting or prejudicial to the good order and discipline of the armed forces would appear to include conduct commonly referred to as sexual harassment. However, counsel should first note a recent decision of the Navy and Marine Corps Court of Military Review (NMCMR) that illustrates some of the limitations inherent in this approach.

In *United States v. Peszynski*,¹¹⁶ the NMCMR considered the appeal of a sailor convicted of violating Article 134, UCMJ, for engaging in unwelcome and repeated comments, gestures, and physical contact of a sexual nature toward three women with whom he worked while off duty.¹¹⁷ The NMCMR set aside the accused's conviction, over vigorous dissent, apparently holding that the conduct as pleaded and as described in the instructions to the trier of fact failed to state an offense under the UCMJ.¹¹⁸ The NMCMR reasoned that terms such as "unwelcome," "repeated," or "of a sexual nature" are not "inherently criminal or even necessarily pejorative in nature; they are basically neutral."¹¹⁹ The NMCMR concluded that such adjectives, without more, "simply do not . . .

provide a definitive standard of behavior subject to punitive sanction."¹²⁰

The NMCMR stressed, however, that their holding was not intended to foreclose the use of Article 134, UCMJ, to prosecute allegations of sexual harassment. This type of charge still might withstand appellate review if properly pleaded (to include sufficiently objective words of criminality) and if the military judge instructed the trier of fact with meaningful legal principles for the court-martial's consideration.¹²¹ While the NMCMR's holding in *Peszynski* is merely persuasive authority on courts-martial of other services, military justice practitioners who can make their way through all three opinions in the case¹²² will have encountered almost every perspective on the various legal issues raised by the use of the general article to prosecute an individual accused of committing sexual harassment.

Sexual Harassment as Misuse of Position or Authority for Personal Gain

Cruelty, oppression, or maltreatment in the form of sexual harassment may include "influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors."¹²³ One who threatens another with any harm to unlawfully obtain anything of value also commits the offense of extortion in violation of Article 127, UCMJ.¹²⁴ The COMA has unambiguously held that the statutory term "anything of value" includes sexual favors and the fulfillment of subjectively-held desires.¹²⁵ Furthermore,

¹¹⁴The general article prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital." UCMJ art. 134 (1988).

¹¹⁵MCM, *supra* note 14, pt. IV, ¶ 60.c.(5).

¹¹⁶40 M.J. 874 (N.M.C.M.R. 1994).

¹¹⁷The facts of the case are relatively unimportant for the purpose of considering whether the allegations state an offense under the UCMJ; they are nonetheless described in some detail in the court's opinion. *See id.* at 876.

¹¹⁸*Id.* at 881-82. The NMCMR's basis for setting aside the accused's conviction is less clear than stated. At times, the NMCMR appeared to state that the offense as pleaded failed to state an offense under the Code, and as such, violated due process. *See id.* at 882 n.10. Alternatively, the NMCMR also seemed to conclude that the military judge's instructions failed to impart any standard by which the trier of fact could "distinguish non-criminal from criminal behavior." *Id.* at 882 & n.11. Perhaps the NMCMR's position could best be described as a conditional alternative: the specifications in question failed to state an offense, but even if they did, the military judge's instructions were fatally deficient for the reasons stated above.

¹¹⁹*Id.* at 879.

¹²⁰*Id.* (footnote omitted).

¹²¹*Id.* at 882 & n.11.

¹²²Chief Judge Larson wrote the lead opinion in the case, Judge McLaughlin filed a concurring opinion, and Senior Judge Welch strongly dissented on virtually every point contained in these two opinions.

¹²³MCM, *supra* note 14, pt. IV, ¶ 17.c.(2).

¹²⁴*See* UCMJ art. 127; MCM, *supra* note 14, pt. IV, ¶ 53.

¹²⁵*United States v. Hicks*, 24 M.J. 3, 5-6 (C.M.A. 1987).

extortion and maltreatment are separate offenses under the UCMJ, and an accused may be charged with, and convicted of, both offenses even if they arise out of the same criminal transaction.¹²⁶

The use of extortion, either as a supplemental offense to cruelty and maltreatment or standing alone, is more problematic when the accused has merely influenced or offered to influence the career, pay, or job of another; in the absence of a threat communicated to the victim, it is unlikely that the offense of extortion will lie.¹²⁷ However, a person subject to the Code who occupies an official position or performs certain official duties who wrongfully asks for, accepts, or otherwise receives sexual favors still may violate the UCMJ. If one asks for, accepts, or otherwise receives sexual favors with the intent to have their decision or action influenced with regard to an official matter, then the offense of bribery has arguably occurred.¹²⁸ In the alternative, if one asks for, accepts, or otherwise receives sexual favors as compensation for, or in recognition of, services rendered, to be rendered, or both, by the accused with regard to an official matter, then the offense of graft may have been committed.¹²⁹ The offenses may be distinguished from one another in that bribery requires proof of specific intent to influence or to be influenced in an official matter, whereas graft merely requires proof of receipt of compensation for performance of official duties when none is due.¹³⁰ Either offense may, according to the facts, be appropriate for use in charging instances of nonextortionate, quid pro quo sexual harassment.¹³¹

Circumstances involving quid pro quo sexual harassment that fail to establish the elements of extortion, bribery, or graft nevertheless may violate the UCMJ if there is evidence of the use of public office for private gain or the misuse of a subordinate's time. The *Standards of Ethical Conduct for the Executive Branch*¹³² (*Standards*) provide, in relevant part that

[a]n employee shall not use . . . his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to a person or to friends, relatives or persons with whom the employee is associated in a non-governmental capacity.¹³³

The *Standards* further state that executive branch employees "shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation."¹³⁴ These prohibitions are general orders applicable to all military members;¹³⁵ one who violates or fails to obey a lawful general order may be charged with violation of Article 92(1), UCMJ.¹³⁶

An accused facing a charge of violating a lawful general order could argue that although it would appear that he has

¹²⁶Offenses are "separate," even if there is no clear expression of legislative intent that they be so considered, if each offense requires proof of a fact that the other does not. *United States v. Teters*, 37 M.J. 370, 376-77 (C.M.A. 1993), cert. denied, 114 S. Ct. 919 (1994). This determination that each offense requires proof of a unique fact is completed by reference only to the elements of the offense, and not the pleadings or proof at trial. *Id.* at 377. The elements of extortion require proof of a specific intent on the part of the accused to obtain something of value, MCM, *supra* note 14, pt. IV, ¶ 53.b.(2), a fact not required by the elements of Article 93, UCMJ. See *id.* ¶ 17.b. Cruelty and maltreatment, on the other hand, requires proof that the victim was subject to the orders of the accused, *id.* ¶ 17.b.(1), while the elements of extortion require no such proof. See *id.* ¶ 53.b. Barring other indications of contrary legislative intent, *Teters*, 37 M.J. at 377, the offenses of extortion and maltreatment appear to be separate for charging and findings.

¹²⁷See UCMJ art. 127.

¹²⁸MCM, *supra* note 14, pt. IV, ¶ 66.b.

¹²⁹*Id.*

¹³⁰*Id.* ¶ 66.c.

¹³¹Both offenses require proof that the conduct was service discrediting or prejudicial to the good order and discipline of the armed forces. *Id.* ¶ 66.b.(1); see UCMJ art. 134 (1988). For a discussion of some of the considerations surrounding proof of these elements, see *supra* notes 94-98 and accompanying text.

¹³²5 C.F.R. § 2635 (1994) (earlier, virtually identical text reprinted in DEP'T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION ch.2 (Aug. 1993) [hereinafter *JER*]).

¹³³*Id.* § 2635.702(a).

¹³⁴*Id.* § 2635.705(b).

¹³⁵*JER*, *supra* note 132, at 20-1 n.1. The applicability of the punitive provisions of the *Standards* to enlisted personnel has been the source of some confusion. The *Standards* define "employee" as "any officer or employee of an agency . . . but not enlisted members of the uniformed services." 5 C.F.R. § 2635.102(h). However, the *Joint Ethics Regulation (JER)* defines "DOD employee" to include any active duty military officer or enlisted member, *JER*, *supra* note 132, at 2, and expressly provides that the prohibitions in the *Standards* that are reproduced in the *JER* in bold italic type "are general orders and apply to all military members without further implementation." *Id.* at 20-1 n.1. The two prohibitions cited in the text accompanying this note are both reproduced in bold italic type in the *JER*.

¹³⁶UCMJ art. 92(1) (1988); MCM, *supra* note 14, pt. IV, ¶ 16.

satisfied all the elements of the offense by his conduct, he should escape a finding of guilt because sexual harassment is not the harm or evil sought to be prevented by the ethical prohibitions found in the *Standards*.¹³⁷ The general principles announced in the *Standards* seem to be primarily concerned not with preventing crimes against persons, but rather, in avoiding conflicts of interest and various prohibited financial transactions.¹³⁸ However, preventing unjust financial enrichment by government employees is not the sole purpose of the *Standards*; they also seek to prevent the erosion of the confidence of the citizenry in the integrity of the federal government.¹³⁹ The prevention and punishment of sexual harassment committed by federal employees arguably furthers this goal.¹⁴⁰

Verbal or physical conduct of a sexual nature that does not fall into one of the categories described above still, depending on the factual circumstances, may amount to a violation of one or more of the punitive articles of the UCMJ. Potential offenses include, but are not limited to, disrespectful or insubordinate conduct,¹⁴¹ dereliction of duty,¹⁴² rape,¹⁴³ sodomy,¹⁴⁴ assault,¹⁴⁵ unbecoming conduct,¹⁴⁶ adultery,¹⁴⁷ fraternization,¹⁴⁸ indecent acts with another,¹⁴⁹ or communication of a threat.¹⁵⁰ These "traditional" offenses proscribe a large spectrum of misconduct commonly associated with sexual harassment, and generally will provide¹⁵¹ a sound basis for criminal disposition of verified allegations of harassing behavior.¹⁵²

¹³⁷United States v. Robinson, 37 M.J. 588 (A.F.C.M.R. 1993) provides example in which this defense was raised in regard to the violation of an Air Force standards of conduct regulation similar to the terms of the current *JER*. The AFCMR found that harassing conduct fell within the terms of the regulation, and thus stated an offense under Article 92(1). *Id.* at 589. For a more extensive treatment of this so-called "offense modification defense," see 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 23 (1984).

¹³⁸See 5 C.F.R. § 2635.101(b) (1994).

¹³⁹See *id.* § 2635.101(a).

¹⁴⁰Accord United States v. Robinson, 37 M.J. 588 (A.F.C.M.R. 1993).

¹⁴¹UCMJ arts. 89-91 (1988).

¹⁴²*Id.* art. 92(3). An extended discussion of the offense of dereliction of duty is beyond the scope of this article. Nevertheless, dereliction often will be a relevant offense in cases involving supervisors who condone the use of sexual behavior by subordinates "to control, influence, or affect the career, pay, or job of a military member or civilian employee." DOD Policy Memorandum, *supra* note 6, at 1. A supervisor who condones quid pro quo sexual harassment is deemed to be engaging in sexual harassment. *Id.* However, it is uncertain whether this conduct would support criminal liability as a principal to cruelty and maltreatment. Cf. UCMJ art. 77 (requiring intent to aid or encourage the perpetrator in cases of noninterference); United States v. Wheatley, 28 C.M.R. 461 (A.B.R. 1959) (finding no maltreatment when commander condones "the horse-play and language of . . . subordinates whenever it exceeds the bounds of good taste"). However, such condonation may amount to a violation of Article 92(3) in that all supervisors have a duty, imposed by regulation, to take appropriate action against those who violate the policy against sexual harassment. See AR 600-20, *supra* note 6, para. 6-5. If a supervisor knew, or reasonably should have known, of this duty, but either willfully or negligently fails to perform it, or, alternatively, performs it in a culpably inefficient manner, then this conduct may amount to a dereliction of duty.

¹⁴³UCMJ art. 120(a) (1988).

¹⁴⁴*Id.* art. 125.

¹⁴⁵Assaultive misconduct incident to sexual harassment could include, in appropriate circumstances, simple or aggravated assault in violation of Article 128, UCMJ, or any of the various assaults described in the *Manual* as violating Article 134, UCMJ; particularly common in this scenario is the offense of indecent assault, a violation of the general article. See United States v. Robinson, 37 M.J. 588 (A.F.C.M.R. 1993) (affirming conviction for indecent assault when accused pressed his groin against victim's buttocks).

¹⁴⁶UCMJ art. 133 (1988).

¹⁴⁷MCM, *supra* note 14, pt. IV, ¶ 62.

¹⁴⁸*Id.* ¶ 83.

¹⁴⁹*Id.* ¶ 90; see United States v. Athey, 34 M.J. 44 (C.M.A. 1992).

¹⁵⁰MCM, *supra* note 14, pt. IV, ¶ 110.

¹⁵¹Either standing alone or in combination with the offenses described in the text above. See *supra* notes 12-150 and accompanying text.

¹⁵²All military justice practitioners must remember that "[a] commander may take or initiate administrative action, in addition to or instead of other action [under the UCMJ] . . . subject to the regulations of the Secretary concerned." See MCM, *supra* note 14, R.C.M. 306(c)(2) (emphasis added). This article does not propose that all verified allegations of sexual harassment should be disposed of by court-martial, but instead seeks to inform the practitioner about the legal issues that may arise in the event that a particular incident is referred to a court-martial for trial.

Summary and Conclusion

Congress has not expressly prohibited sexual harassment per se in the punitive articles of the UCMJ.¹⁵³ However, unwelcome verbal or physical conduct of a sexual nature is, under certain circumstances, prohibited as a matter of administrative policy by the DOD.¹⁵⁴ Moreover, sexual harassment may amount to cruelty and maltreatment, thereby violating Article 93, UCMJ.¹⁵⁵ Verbal conduct of a sexual nature may violate the UCMJ if it is indecent, provocative, communicates a threat, or is of such a nature as to amount to disorderly conduct.¹⁵⁶ Furthermore, sexual harassment of the quid pro quo variety may constitute extortion, bribery, graft, or violation of a general order prohibiting the misuse of government position, authority, or personnel for personal gain.¹⁵⁷ Additionally, unwelcome physical conduct of a sexual nature may, depend-

ing on the facts, violate any one or more of a number of prohibitions found in the punitive articles of the UCMJ.¹⁵⁸ Finally, sexual harassment can be the basis for adverse administrative action independent of any disposition under the UCMJ.¹⁵⁹ In light of the various strengths of these numerous alternatives, the military justice practitioner already possesses the ability to effectively litigate and dispose of allegations of sexual harassment within the existing statutory framework of the UCMJ.¹⁶⁰ Nonetheless, the prudent litigator will consider the limitations of each approach, and not be fearful of an administrative disposition in the appropriate case. In any event, judge advocates and commanders should always be mindful that education, training, and strong leadership are at least as important as the occasional court-martial in ridding the armed forces of sexual harassment.¹⁶¹

¹⁵³ See generally UCMJ arts. 78, 80-134 (1988).

¹⁵⁴ DOD Policy Memorandum, *supra* note 6, at 1.

¹⁵⁵ See *supra* notes 12-74 and accompanying text.

¹⁵⁶ See *supra* notes 81-113 and accompanying text.

¹⁵⁷ See *supra* notes 123-40 and accompanying text.

¹⁵⁸ See *supra* notes 141-52 and accompanying text.

¹⁵⁹ See *supra* note 152. Counsel should note that the Department of the Navy has implemented a policy that requires an individual to be processed for separation on the first substantiated incident of sexual harassment involving [either] . . . threats or attempts to influence another's career or job for sexual favors . . . rewards in exchange for sexual favors [or] . . . physical conduct of a sexual nature which, if charged as a violation of the UCMJ, could result in a punitive discharge.

Memorandum, Office of the Secretary, Department of the Navy, for Chief of Naval Operations & Commandant of the Marine Corps, subject: Zero Tolerance of Sexual Harassment (5 Feb. 1992). The policy provides further that an "incident is substantiated if there has been a court-martial conviction or the commanding officer determines that sexual harassment has occurred." *Id.* Such a policy, even if not formally adopted in the manner of the naval services, would seem to be an effective means of communicating to harassers and victims alike that sexual harassment will not be tolerated.

¹⁶⁰ While a comprehensive analysis of the proposed statutory revision that would expressly prohibit sexual harassment as a separate punitive article of the UCMJ is beyond the scope of this article, one could reasonably conclude that the utility of the proposal is significantly diminished by the wide variety of charging alternatives already present in the Code. Moreover, the difficulty in defining sexual harassment with the degree of precision sufficient to satisfy due process concerns probably will necessitate much litigation and expenditure of increasingly scarce judicial resources. *Cf. United States v. Peszynski*, 40 M.J. 874 (N.M.C.M.R., 1994) (litigating sufficiency of pleadings and instructions describing sexual harassment charged under Article 134, UCMJ). These factors, among others, militate in a compelling fashion against the adoption of the proposed amendment to the UCMJ.

¹⁶¹ See Parks, *supra* note 1, at 103. For additional discussion of the issues addressed by this article, as well as other related topics, see Lieutenant Commander J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1 (1993).

Union Access to Information: The Particularized Need Test for Internal Management Information

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Introduction

Under the Federal Service Labor-Management Relations Statute (FSLMRS), an agency is under a duty to provide the exclusive representative with information necessary to represent the bargaining unit.¹ Specifically, the exclusive representative is entitled to information that is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining [§ 7114(b)(4)(B)]"²

However, an exclusive representative's entitlement to "necessary" information is not absolute. Under the FSLMRS, an agency is under no obligation to provide even "necessary" information which constitutes "guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining [§ 7114(b)(4)(C)]"³ Thus, when determining whether or not to release information, an agency must first understand the limits of § 7114(b)(4)(C). If that provision does not apply, management should consider the requirement under § 7114(b)(4)(B) to determine if it is necessary.

Unfortunately, determining what constitutes "necessary" information has been the subject of considerable debate and litigation. The Federal Labor Relations Authority's (FLRA) interpretation was that information that was "relevant" to the exclusive representative in representing the bargaining unit was "necessary" under § 7114(b)(4)(B). Not surprisingly, agencies challenged the FLRA's interpretation in the federal courts.

As a result of the litigation over § 7114(b)(4)(B), the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) reviewed and rejected the FLRA's interpretation.⁴ In its place, the D.C. Circuit developed the "particularized need" test.⁵ Under this test, the exclusive representative's "need" for the requested internal management information must outweigh the agency's countervailing antidisclosure interest.

This article will examine whether such a stringent standard is necessary and propose a two-prong test for analyzing information issues.

The Federal Service Labor-Management Relations Statute

The FSLMRS provides the basic framework for collective bargaining in the federal sector.⁶ At its core, the FSLMRS imposes a duty on the agency and the exclusive representative to negotiate in good faith to reach a collective bargaining agreement.⁷

As part of its duty to negotiate in good faith, an agency must furnish the exclusive representative with information that is "necessary" concerning the subjects within the scope of collective bargaining.⁸ In this regard, § 7114(b) of the FSLMRS defines an agency's duty as follows:

(b) The duty of an agency and an exclusive representative to negotiate in good faith . . . shall include the obligation—

¹ See 5 U.S.C. § 7114(b)(4)(B). The "exclusive representative" also will be referred to as the "union."

² *Id.*

³ *Id.* § 7114(b)(4)(C) (referred to hereinafter as "intramanagement information" (*i.e.*, deliberative and predecisional type information)).

⁴ See *NLRB v. FLRA*, 952 F.2d 523 (D.C. Cir. 1992).

⁵ Member Talkin of the FLRA recognized that "the Authority has often applied its previous standard for determining necessity under section 7114(b)(4)(B) too broadly [*i.e.*, equating "necessary" with "relevant"] and that a more precise definition of that term may be needed." National Park Service & Police Ass'n of the District of Columbia, 48 FLRA 1151, 1170 (1993) (dissenting opinion). In her dissenting opinion, Member Talkin posited a new definition of "necessary." She argued that this new definition of "necessary" should be used rather than the particularized need test. *Id.* at 1170-71. See *infra* notes 98-99 and accompanying text.

⁶ See 5 U.S.C. §§ 7101-7135 (Supp. 1994).

⁷ *Id.* § 7114(b)(1).

⁸ It is considered an unfair labor practice for an agency to fail to provide required information to the exclusive representative. This is a violation of an agency's duty to negotiate in good faith under the FSLMRS. See *DOJ v. FLRA*, 988 F.2d 1267, 1269 (D.C. Cir. 1993).

...
(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.⁹

While a union's right to information depends on a number of factors, the distinction between the "necessary" requirement of § 7114(b)(4)(B) and the intramanagement information exemption of (b)(4)(C) are particularly important. If information falls within the parameters of § 7114(b)(4)(C), then an agency is under no obligation to release the information. In other words, an agency will not have to evaluate whether that information is "necessary" under § 7114(b)(4)(B). Thus, an agency first must determine whether the requested information falls within the parameters of § 7114(b)(4)(C).

Step One: Does § 7114 (b)(4)(C) Apply?

The FLRA previously examined the distinction in *NLRB & NLRB Union Local 6*.¹⁰ The agency refused to release a supervisor's memorandum which addressed an employee's request for a part-time work schedule. The agency argued that the memorandum constituted intramanagement information which was exempt from disclosure by § 7114(b)(4)(C).

The FLRA focused on the language of § 7114(b)(4)(C). After defining the term "collective bargaining" and examining the legislative history of the FSLMRS, the FLRA concluded that § 7114(b)(4)(C) "constitutes a narrow exception to an agency's duty to furnish data under § 7114(b)(4)."¹¹

The FLRA also noted that "the courts have interpreted § 7114(b)(4)(B) as encompassing information needed by an exclusive representative to perform the full range of its representational responsibilities under the [FSLMRS]."¹² Based on these observations, the FLRA made a specific determination as to what information is exempt from disclosure under § 7114(b)(4)(C). In this regard, the FLRA stated:

In light of the legislative history and established precedent concerning the scope of the agency's obligation to furnish data under § 7114(b)(4) of the Statute, we conclude that § 7114(b)(4)(C) exempts from disclosure to the exclusive representative information which contains guidance, advice, counsel, or training for management officials relating specifically to the *collective bargaining process*, such as: (1) courses of action agency management should take in negotiations with the union; (2) how a provision of the collective bargaining agreement should be interpreted and applied; (3) how a grievance or an unfair labor practice charge should be handled; and (4) other labor-management interactions which have an impact on the union's status as the exclusive bargaining representative of the employees. We further conclude that § 7114(b)(4)(C) *does not exempt for disclosure guidance, advice or counsel to management officials concerning the conditions of employment of a bargaining unit employee, for example: the personnel, policies and practices and other matters affecting the employee's*

⁹For purposes of this article, assume that the requested information is "normally maintained by the agency in the regular course of business" and "reasonably available." Moreover, assume that the disclosure of the requested information is "not prohibited by law." Rather, focus on the "necessary" requirement of (b)(4)(B). For a discussion on the requirement that the information must be maintained by the agency in the regular course of business, see *HHS & AFGE*, 12 FLRA 390 (1983); for the reasonably available requirement, see *DOJ V. FLRA*, 991 F.2d 285 (5th Cir. 1993); for the "not prohibited by law" requirement, see generally *DOD v. FLRA*, 114 S. Ct. 1006 (1994).

¹⁰38 FLRA 506 (1990).

¹¹*Id.* at 520. The FLRA defined the term "collective bargaining" as the "performance" of the parties' "mutual obligation" to "consent and bargain . . . with respect to the conditions of employment affecting [unit] employees." *Id.* at 519 (citing 5 U.S.C. § 7103(a)(12)). The FLRA then defined the term "conditions of employment" as "personnel policies, practices, and matters . . . affecting working conditions." *Id.* (citing 5 U.S.C. § 7103(a)(14)).

¹²*Id.* at 520-21 (citing *AFGE, Local 1345 v. FLRA*, 793 F.2d 1360 (D.C. Cir. 1986)). As an example, the FLRA quoted from *AFGE, Local 1345*, where the D.C. Circuit had reviewed the wording of § 7114(b)(4)(B) and stated that "[t]his statutory mandate is perfectly consistent with the well-understood principle that, in collective bargaining, [t]he duty to request and supply information is part and parcel of the fundamental duty to bargain." *Id.* at 521. Indeed, consistent with this decision, the FLRA has required agency's to release information that will enable the exclusive representative to carry out its duties in representing the bargaining unit. *Id.* at 522 (citations omitted).

working conditions that are not specifically related to the collective bargaining process.¹³

In light of the FLRA's interpretation of § 7114(b)(4)(C), an agency must release "necessary" internal management information that does not relate to the "collective bargaining process."¹⁴ In *NLRB v. FLRA*,¹⁵ the D.C. Circuit upheld the FLRA's construction of § 7114(b)(4)(C).

As a result, an agency should first examine whether information falls within the parameters of § 7114(b)(4)(C), as defined by the FLRA. If it does, then an agency is under no obligation to release the information. If the requested information does not qualify for the exemption of § 7114(b)(4)(C), then the agency must evaluate whether that information is "necessary" under § 7114(b)(4)(B). If the information is "necessary" it must be released to the exclusive representative.

For the remainder of this article, the term "internal management information" refers to information that does not relate to the "collective bargaining process," as determined by the FLRA (*i.e.*, information that does not qualify for the § 7114(b)(4)(C) exemption). Internal management information consists of guidance, advice, or counsel—deliberative and predecisional-type information—to management officials concerning the conditions of employment of a bargaining unit employee (*i.e.*, information that falls under § 7114(b)(4)(B)).

The term "intramanagement information" refers to information which relates to the "collective bargaining process," as determined by the FLRA. Only "intramanagement information" qualifies for the § 7114(b)(4)(C) exemption.

The remainder of this article will not address information that qualifies for the § 7114(b)(4)(C) exemption and instead will focus on whether "internal management information" meets the necessary requirement of § 7114(b)(4)(B). The FLRA's initial position as to what it deemed "necessary" information under § 7114(b)(4)(B) was the catalyst that led to the development of the particularized need test.

Step Two: Is the Information "Necessary?"

The development of the FLRA's interpretation of the "necessary" requirement of § 7114(b)(4) has an interesting history. When requesting information under § 7114(b)(4), unions initially argued that the FLRA should employ the "presumptive relevance" doctrine.¹⁶ This doctrine placed the burden on an agency to establish that information requested by a union was not *relevant* to subjects within the scope of collective bargaining.¹⁷

The FLRA consistently declined to adopt the "presumptive relevance" doctrine.¹⁸ Instead, the FLRA required a case-by-case determination of whether the requested information was

¹³ *Id.* at 522-23 (emphasis added).

¹⁴ In *NLRB & NLRB Union Local 6*, the FLRA determined that the supervisor's memorandum was not exempt under § 7114(b)(4)(C). Moreover, the FLRA determined that the memorandum was "necessary" under § 7114(b)(4)(B). *Id.* at 524. The FLRA's interpretation of "necessary," however, was rejected by the D.C. Circuit in *NLRB v. FLRA*, 952 F.2d 523 (D.C. Cir. 1992). See *infra* notes 40-56 and accompanying text.

¹⁵ 952 F.2d 523 (D.C. Cir. 1992). Based on the FLRA's construction of (b)(4)(C), the D.C. Circuit summarized the disclosure requirements of an agency faced with a request for internal management information:

Information on "guidance," "advice," "counsel" or "training" for management officials that is not covered by the FLRA's construction of § 7114(b)(4)(C) must be disclosed under § 7114(b)(4)(B) if the information is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining."

Id. at 525. Understanding the relationship between § 7114(b)(4)(B) and (C), as interpreted by the FLRA, is imperative. For example, the D.C. Circuit, in a decision rendered less than two months after *NLRB v. FLRA*, confused this relationship. See *Department of Air Force v. FLRA*, 956 F.2d 1223 (D.C. Cir. 1992), where, the D.C. Circuit remanded the case to the FLRA in light of its recent decision in *NLRB v. FLRA*. However, the D.C. Circuit incorrectly summarized its previous decision by stating: "[i]n the context of subsection (b)(4)(C), the Court said, information containing 'guidance, advice, counsel or training' for management should be released upon union request 'only in those circumstances when the union has a particularized need for the information.'" *Id.* at 1224. With this language, it appears as if the D.C. Circuit applied the particularized need test to intramanagement information under § 7114(b)(4)(C). As indicated above, the D.C. Circuit in *NLRB v. FLRA* only applied the particularized need test to internal management information that "is not covered by the FLRA's construction of § 7114(b)(4)(C)." *NLRB v. FLRA*, 952 F.2d at 525.

¹⁶ For example, see *Department of Health and Human Services, Social Security Administration*, 21 FLRA No. 35 (1986); *Department of Health and Human Services, Social Security Administration*, 21 FLRA 517 (1986).

¹⁷ The "presumptive relevance" doctrine was first enunciated by Guy Farmer, then-Chairman of the National Labor Relations Board (NLRB). See *AFGE v. FLRA*, 811 F.2d 769, 772 (2d Cir. 1987). However, as the United States Court of Appeals for the Second Circuit (Second Circuit) noted, the doctrine is used in the private sector under the National Labor Relations Act which requires disclosure of relevant information. *Id.* at 773. In contrast, under the FSLMRS, § 7114(b)(4)(B) only requires an agency to furnish information that is "necessary." The Second Circuit further noted that Congress did not use the term "relevance" or a "provision providing for a relevance-based standard in § 7114(b)(4)." *Id.* Thus, the Second Circuit concluded that the presumptive relevance doctrine was inappropriate in the public sector. *Id.* at 774.

¹⁸ See *supra* note 16; see also *AFGE*, 811 F.2d at 772.

"necessary" under § 7114(b)(4)(B).¹⁹ In this regard, the FLRA stated:

a union's bare assertion that it needs data to process a grievance does not automatically oblige the agency to supply such data, but the duty to supply data under section 7114(b)(4) of the Statute turns upon the nature of the request and the circumstances in each particular case.²⁰

In *AFGE v. FLRA*, the Second Circuit agreed with the FLRA that the "presumptive relevance" doctrine was inappropriate under § 7114(b)(4).²¹ The Second Circuit noted, however, that the FLRA's interpretation of the "necessary" requirement of § 7114(b)(4)(B) was too narrow.²² The FLRA had refused to order release of the requested information because the union had made only a bare assertion that it needed the information.²³

Despite the FLRA's position, the Second Circuit noted that "[i]t is well-settled that § 7114 creates a duty to provide information that would enable the Union to process a grievance or to determine whether or not to file a grievance."²⁴ The Second Circuit concluded that the requested information would be *useful* to evaluate a potential grievance.

Thus, the requested information was deemed "necessary" under § 7114(b)(4)(B).²⁵

The Second Circuit's reasoning is difficult to understand. On one hand, the Second Circuit agreed with the FLRA that the "presumptive relevance" doctrine should not be adopted in the public sector because Congress did not use the term "relevance" or a "provision providing for a relevance-based standard in § 7114(b)(4)."²⁶ Alternately, by requiring the release of information that is "useful" to evaluate a potential grievance, the Second Circuit has, in effect, equated "necessary" information with "relevant" information.²⁷

In light of the Second Circuit decision, it is not surprising that the FLRA, in subsequent decisions, equated "necessary" information with "relevant" or "useful" information. For example, in *DOJ, Immigration and Naturalization Service & AFGE*,²⁸ the FLRA stated that "data requested by a union is necessary, within the meaning of § 7114(b)(4) of the Statute, if it would be *useful* to the Union in the investigation and/or presentation of a potential grievance."²⁹

As a result of the Second Circuit decision and the referenced FLRA case, the FLRA developed its interpretation of what constitutes "necessary" information under § 7114(b)(4)(B). The FLRA's interpretation equated "neces-

¹⁹ See *AFGE*, 811 F.2d at 772; *AFGE v. FLRA*, 793 F.2d 1360, 1364 (D.C. Cir. 1986).

²⁰ *Department of Health and Human Services*, 21 FLRA at 519 (citation omitted); see also *AFGE*, 811 F.2d at 774. In *Department of Health and Human Services*, the union requested the names of all employees who were under a performance improvement plan; the operative dates of the plans; and the race, sex, color, religion, and age of all those identified. The union stated that the information was "necessary in connection with the processing of a possible grievance." *Department of Health and Human Services*, 21 FLRA at 518. In analyzing this matter, the FLRA stated "that the record reveals that the Union failed and refused to explain why it was seeking the information despite management's reasonable requests for clarification so that it could make an informed judgment as to whether or to what extent the information sought was necessary for collective bargaining purposes." *Id.* at 520. Accordingly, the FLRA found that the agency did not unlawfully refuse to furnish the data to the union. *Id.*

²¹ *AFGE*, 811 F.2d at 774. See *supra* note 17.

²² *Id.* at 774.

²³ The union had requested various progress reports and performance appraisals to determine whether to file a grievance. *Id.* at 771.

²⁴ *Id.* (quoting *AFGE, Local 1345 v. FLRA*, 793 F.2d 1360, 1364 (D.C. Cir. 1986)).

²⁵ *Id.* at 775.

²⁶ *Id.* at 773. See *supra* note 17.

²⁷ In the dissenting opinion, however, Judge Miner believed that the union failed to provide the agency with a sufficient justification for the information. As a result, "the agency was unable to make an informed judgment as to whether, or to what extent, the data was necessary for collective bargaining purposes." *Id.* at 775.

²⁸ 37 FLRA 1310 (1990).

²⁹ *Id.* at 1320 (emphasis added). In reaching this conclusion, the FLRA cited a long list of cases that stood for the proposition that "under § 7114(b)(4) of the Statute the exclusive representative has a right to information that is necessary to enable it to fulfill its representational functions, including data which will assist in the evaluation and processing of a potential grievance." *Id.* at 1319 (citations omitted).

sary" with "relevant," (i.e., "useful") and as a result, virtually all internal management information was releasable.³⁰

NLRB & NLRB Union Local 6 aptly demonstrated this interpretation.³¹ In *Local 6*, a lawyer employed by the NLRB requested a part-time work schedule pursuant to a provision in the parties' collective bargaining agreement. The Regional Director wrote a memorandum to the Associate General Counsel discussing the employee's request and the pertinent issues.³² The Director concluded that the employee's request be denied.

After review of the employee's request and the Regional Director's memorandum, the Associate General Counsel, by memorandum, denied the employee's request.³³ The employee's exclusive representative requested a copy of the Regional

Director's memorandum to determine whether to file a grievance over the denial of the part-time schedule. The NLRB refused to provide the internal management memorandum asserting that it was not "necessary" under § 7114(b)(4)(B).³⁴

In reviewing the necessary requirement of § 7114(b)(4)(B), the FLRA once again noted that an exclusive representative is entitled to information that will assist it in evaluating and processing a grievance.³⁵ With this principle in mind, the FLRA easily found that the Regional Director's memorandum was necessary within the meaning of § 7114(b)(4).³⁶

The FLRA stated that the memorandum was "necessary for the Union to fully know and understand the basis underlying the [NLRB's] position on the employee's request."³⁷ In short, the FLRA equated "necessary" with "relevant."³⁸ According

³⁰The FLRA had wrestled with the releasability of internal management information for a number of years. Initially, the FLRA claimed release of internal management information was prohibited by law. The D.C. Circuit rejected the prohibited by law position. See *NLRB Union, Local 6 v. FLRA*, 842 F.2d 483 (D.C. Cir. 1988). In *NLRB Union, Local 6*, the D.C. Circuit reviewed two FLRA decisions involving union requests for internal management information (*NLRB & NLRB Union, Local 6*, 26 FLRA 108 (1987); *National Park Service*, 26 FLRA 441 (1987)). In both cases, the FLRA determined that the release of the information was "prohibited by law." In reaching this conclusion, the FLRA reasoned that the release of internal management information would interfere with the exercise of management rights as detailed in 5 U.S.C. § 7106. The FLRA then "interpreted the 'prohibited by law' language of § 7114(b)(4) to mean that all data pertaining to subjects as to which agency management was not required to negotiate pursuant to § 7106 was not disclosable under § 7114." *NLRB Union, Local 6*, 842 F.2d at 486.

The D.C. Circuit rejected the FLRA's interpretation of the "prohibited by law" language of § 7114(b)(4) and stated that to refuse to release information under the "prohibited by law" language of § 7114(b)(4) "there must be something somewhere in the law that forbids that data's disclosure." *Id.* The D.C. Circuit then analyzed whether § 7106 forbids disclosure and stated:

Section 7106 by any reading does not prohibit the disclosure of anything. All it does is reserve to management the authority to act in certain areas. Nothing in § 7106 prohibits management from disclosing any or all of the data relied upon or accumulated by it in acting within those areas. . . . The interpretation the Authority gives to this section [7114(b)(4)] is simply not a reasonable one and, indeed, is not an interpretation at all, but rather is a rewriting of the section.

Id. at 486-87. The D.C. Circuit also noted that the "prohibited by law" language typically applies to the provisions of the Freedom of Information Act and the Privacy Act. *Id.* at 487.

³¹38 FLRA 506 (1990). See also *infra* note 38.

³²*Id.* at 507. "In the memorandum, the Regional Director set forth the reasons why the employee sought part-time employment, the contents of his discussion with the employee, the problems experienced where part-time schedules have been implemented, the staff complement, case intake, workload factors, and staffing problems in the regional office." *Id.*

³³*Id.* A copy of the Associate General Counsel's memorandum was sent to the employee, in which

the Associate General Counsel discussed: (1) the staff ceiling and current staffing of the region; (2) the recent case intake and productivity levels of the region; (3) the projected increase in case intake and workload in 1985; and (4) the denial of recent requests for part-time employment from two other attorneys in the office. . . . He also noted that the Regional Director recommended that the employee's request be denied.

Id. at 507-08.

³⁴The NLRB also argued that the Regional Director's memorandum constituted "guidance, advice, or counsel within the meaning of § 7114(b)(4)(C) of the Statute and should not be disclosed to the Union." *Id.* at 513. For a full discussion of this issue, see *supra* text accompanying notes 8-15.

³⁵*Id.* at 516. The FLRA used virtually identical language and citations as it used in *DOJ, Immigration and Naturalization Service & AFGE*. See *supra* note 29.

³⁶The FLRA directed the NLRB to release the Regional Director's memorandum to the union. *Id.* at 524.

³⁷*Id.* at 517. According to the FLRA, the memorandum was necessary despite that the union had received a copy of the Associate General Counsel's memorandum which fully explained his reasons for denying the part-time schedule. See *supra* note 33.

³⁸In other cases involving internal management information, the FLRA used identical reasoning to determine that the information was necessary under § 7114(b)(4)(B). See *National Park Service & Police Ass'n of the District of Columbia*, 38 FLRA 1027, 1037 (1990); *AFGE, Local 1857*, 38 FLRA 965, 970-71 (1990). These two cases, along with *Local 6*, were consolidated for review by the D.C. Circuit in *NLRB v. FLRA*, 952 F.2d 523 (D.C. Cir. 1992). In *NLRB v. FLRA*, the D.C. Circuit rejected the FLRA's interpretation of the necessary requirement of § 7114(b)(4)(B) and developed the particularized need test. See *infra* text accompanying notes 40-56.

to the FLRA, because the memorandum was "relevant" (i.e., "useful") to the union, its disclosure was "necessary" within the meaning of § 7114(b)(4)(B).

The NLRB challenged the FLRA's order which required the disclosure of internal management information—the Regional Director's memorandum. In essence, the NLRB challenged the FLRA's interpretation of the necessary requirement of § 7114(b)(4)(B)—equating "necessary" with "relevant." As a result, the D.C. Circuit in *NLRB v. FLRA*, rejected the FLRA's interpretation and developed the particularized need test.³⁹

The Particularized Need Test

In *NLRB v. FLRA*, three federal agencies petitioned the D.C. Circuit to review the FLRA's order which required the agencies to disclose internal management information.⁴⁰ In all three cases, "the unions requested documents embodying recommendations that subordinate agency officials had provided their superiors regarding possible actions to be taken against agency employees."⁴¹ The unions asserted that the documents, which constituted internal management information, were "necessary" for possible employee grievances. The FLRA agreed.

The D.C. Circuit addressed the propriety of the FLRA's interpretation of what constitutes "necessary" information under § 7114(b)(4)(B)⁴² and concluded that:

the FLRA's construction of § 7114(b)(4)(B) is flawed to the extent that the Authority views the subsection to cover both "necessary" and "relevant" information. This view is clearly incorrect with respect to information on "guidance," "advice," "counsel" or "training" for management officials. The FSLMRS makes only "necessary" documents available to the union, not merely "relevant" ones. Where the information sought pertains "guidance," "advice," "counsel" or "training" for management officials, "necessity" means that there must be a *particularized need* in order to justify disclosure under subsection (b)(4)(B).⁴³

In articulating the parameters of the particularized need test, the D.C. Circuit started its analysis with the language of § 7114(b)(4)(B). The D.C. Circuit noted that "a statute that requires 'necessity' implicitly recognizes countervailing interests."⁴⁴ Thus, the D.C. Circuit reasoned "[i]n weighing the

³⁹952 F.2d 523 (D.C. Cir. 1992).

⁴⁰In *NLRB v. FLRA*, the D.C. Circuit reviewed the following FLRA decisions: *Local 6*, 38 FLRA at 506; *National Park Service & Police Ass'n*, 38 FLRA at 1027; *AFGE, Local 1857*, 38 FLRA at 965. See *supra* note 38.

⁴¹*NLRB v. FLRA*, 952 F.2d at 525. The internal management information sought by the three unions in *NLRB v. FLRA* is briefly described as follows. In *Local 6*, the union sought the Regional Director's memorandum which contained his recommendation concerning the employee's request for a part-time work schedule. *Id.* at 526. In *National Park Service*, the union sought intra-agency recommendations for disciplinary actions and sick leave requests. *Id.* at 527. In *AFGE, Local 1857*, the union sought the agency's coordination sheet which contained the recommendations of various agency officials as to disciplinary action against employees. *Id.* at 528.

⁴²In *NLRB v. FLRA*, the D.C. Circuit addressed two other issues. The first issued concerned whether § 7114(b)(4) incorporates a "FOIA-like" exemption for predecisional, deliberative documents. The D.C. Circuit quickly disposed of this issue. The D.C. Circuit noted that the FLRA previously held that the "right to data under § 7114(b) . . . is not controlled by the Freedom of Information Act." *Id.* at 529 n.4 (quoting *National Treasury Employees Union*, 8 FLRA 547, 556 (1982)). The D.C. Circuit agreed with the FLRA's conclusion. *Id.* at 529. The second issue concerned the distinction between the "necessary" requirement of § 7114(b)(4)(B) and the intramanagement information exemption of § 7114(b)(4)(C). The D.C. Circuit also quickly disposed of this issue and agreed with the FLRA's interpretation that only "guidance, advice, counsel or training for management officials that concerns the process of collective bargaining" qualifies under the (b)(4)(C) exemption. *Id.* See *supra* text accompanying notes 8-15.

⁴³*Id.* at 529 (emphasis added). See also *DOJ v. FLRA*, 991 F.2d 285 (5th Cir. 1993). In *DOJ v. FLRA*, the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) agreed with the D.C. Circuit's conclusion that the FLRA had been using the "wrong standard to determine whether an agency must furnish information under 5 U.S.C. § 7114(b)(4)." *Id.* at 291 n.3. The Fifth Circuit held, as did the D.C. Circuit, "that the FLRA's interpretation of 'necessary' is not supportable because it confuses the term with 'useful.'" *Id.* at 287. The Fifth Circuit noted that the "FLRA seems to have taken the standard under that the National Labor Relations Board uses in the private sector, i.e., useful and relevant, and appropriated it for the public sector." *Id.* at 290 (citation omitted). According to the Fifth Circuit, this was improper because under the FSLMRS, "Congress chose a much higher standard to regulate the production of information in order to promote efficient government action." *Id.* In this regard, the Fifth Circuit stated:

Under the FSLMRS, unlike the NLRA, unions are entitled only to *necessary* information. There is a significant qualitative and quantitative difference between information that is relevant and information that is necessary. Information that is only relevant may be useful, but it does not fall under the category of necessary. The information becomes necessary only if the information is required in order for the union adequately to represent its members.

Id.

⁴⁴*NLRB v. FLRA*, 952 F.2d at 531. The D.C. Circuit reasoned this was true "because a 'need,' by definition, is an interest of particular strength and urgency." *Id.*

employer's duty to furnish information under subsection (b)(4)(B), the requisite strength of the union's 'need' will depend on the intensity of countervailing interests."⁴⁵

With respect to an agency's countervailing interests, the D.C. Circuit made two observations. First, it noted that by enacting § 7114(b)(4)(C), Congress had recognized that an agency's countervailing nondisclosure interest "is most weighty with respect to matters relating to the *process* of collective bargaining," (i.e., intramanagement information).⁴⁶ According to the D.C. Circuit, an agency's "weighty" countervailing nondisclosure interest explained the "categorical exemption found in § 7114(b)(4)(C)."⁴⁷ Second, with respect to internal management information—which does not qualify for the (b)(4)(C) exemption—the D.C. Circuit noted that an agency's antidisclosure "interest exists, albeit to a lesser degree."⁴⁸

In light of these observations, the D.C. Circuit determined that under the particularized need test, an agency's interest in

protecting the sanctity of internal management information "must be weighed against a union[s] claim of necessity under § 7114(b)(4)(B)."⁴⁹ This analysis begins with the union's articulation of a legitimate need for internal management information.⁵⁰ The agency must then weigh that "need" against its countervailing antidisclosure interest. If the union's "need" outweighs the agency's countervailing interest, then the agency must disclose the internal management information.⁵¹

In discussing the particularized need test, the D.C. Circuit stated that with respect to internal management information, "section 7114(b)(4)(B) normally will not require disclosure."⁵² However, the D.C. Circuit provided two specific instances when a union would be able to demonstrate a particularized need for internal management information: (1) when a union has a grievable complaint covering the information;⁵³ and (2) when a requested document creates a grievable action.⁵⁴

⁴⁵ *Id.*

⁴⁶ *Id.* at 532.

⁴⁷ *Id.*

⁴⁸ *Id.* (citing *International Union of Elec. Radio & Mach. Workers v. NLRB*, 648 F.2d 18, 28 (D.C. Cir. 1981)) ("[t]he interest a union might have in [certain predecisional, deliberative documents] must be balanced with the desirability of confidential, frank self-analysis on the part of the employer"); *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 362-63 (D.C. Cir. 1983). Interestingly, these cases deal with issues that arose in the private sector under the National Labor Relations Act.

⁴⁹ *NLRB v. FLRA*, 952 F.2d at 531. See also *United States Dep't of Veterans Affairs v. FLRA*, 1 F.3d 19, 23 (D.C. Cir. 1993). Moreover, the particularized need test must be done on a case-by-case basis. *NLRB v. FLRA*, 952 F.2d at 532.

⁵⁰ Under § 7114(b)(4), a union "bears the burden of demonstrating that the information is necessary for the performance of its representational duties." *Department of Health and Human Services & NTEU*, 49 FLRA 61, 70 (1994) (citing *AFGE, AFC-CIO v. FLRA*, 811 F.2d 769, 774-75 (2d Cir. 1987)); *DOJ, Immigration and Naturalization Service*, 37 FLRA 1310, 1322 (1990).

⁵¹ The D.C. Circuit remanded the three cases to the FLRA for adjudication under the particularized need test. See *supra* note 40. A remand was necessary because the FLRA had failed to examine the union's need against the agency's countervailing interests. *NLRB v. FLRA*, 952 F.2d at 534.

⁵² *Id.* at 533.

⁵³ The D.C. Circuit provided the following example to illustrate the first instance when a union could satisfy the particularized need test:

A statute or the contract may impose a duty on the agency regarding predecisional deliberation, and the duty may then ground a grievable claim of right in the employee or union. If so, disclosure normally should obtain. For example, a collective bargaining agreement may establish an agency procedure for employee action. The agreed-upon procedure might be multi-level, pursuant to which subordinate officials might be required to make interim recommendations before a final decision issues. . . . [T]he recommendations should normally be disclosed to the union, assuming the union could grieve the agency's failure to follow the procedure. In such a case, the union would have a particularized need to know whether the agency has complied with the collective bargaining agreement.

Id. at 532-33 (hereinafter Situation 1).

⁵⁴ The D.C. Circuit provided the following example to illustrate the second instance when a union could satisfy the particularized need test:

A subordinate supervisor might counsel or warn an employee about allegedly poor work performance and then place a confirming written evaluation in the employee's personnel file. If the parties' agreement or existing practices make it clear that such evaluations are used to determine subsequent disciplinary action by superior management officials (pursuant to a scheme of "corrective" or "progressive" discipline), the employee surely would have a strong and valid claim to disclosure under § 7114(b)(4)(B). The union would need the information to determine whether the employee must be protected against the accumulation of negative evaluations in his or her personnel file (that ultimately may lead to disciplinary action), or to determine whether disciplinary action that has been taken is justified by the employee's record.

Id. at 533 (hereinafter Situation 2).

In *NLRB v. FLRA*, the D.C. Circuit developed a particularized need test that could have been confusing in its application because the D.C. Circuit appeared to indicate that the two specified instances were the *only* ways by which a union could satisfy the particularized need test.⁵⁵ For example, the D.C. Circuit stated that “where the union has no grievable complaint covering information on ‘guidance,’ ‘advice,’ ‘counsel’ or ‘training,’ § 7114(b)(4)(B) normally will not require disclosure.”⁵⁶

The D.C. Circuit should have concluded its analysis after discussing the “weighing of interests” requirement. Specifically, the D.C. Circuit should have stopped after it required that the agency’s countervailing nondisclosure interest be weighed against the union’s claim of necessity under § 7114(b)(4)(B). This would have provided a workable framework (*i.e.*, the weighing of interests) for the FLRA. This framework would have allowed the FLRA to determine, on a case-by-case basis, whether the union had demonstrated a sufficient “need” that warranted disclosure under § 7114(b)(4).

Unfortunately, by discussing the two examples the D.C. Circuit appeared to define the only circumstances when the union’s “need” for information would meet the particularized need test. It could appear that if a union’s “need” for information does not fit into one of the examples set forth by the D.C. Circuit, then disclosure would not be required.⁵⁷

Moreover, in each of its examples in *NLRB v. FLRA*, the D.C. Circuit appeared to disregard consideration of the agency’s countervailing nondisclosure interest.⁵⁸ According

to the D.C. Circuit, as long as a union’s request fit into one of the examples, “the union would have a particularized need” for the information.⁵⁹ In effect, the D.C. Circuit appeared to take away all discretion from the FLRA in determining what constitutes “necessary” information under § 7114(b)(4)(B).

Fortunately, subsequent decisions from the D.C. Circuit have resolved the confusion in this area. In these decisions, the D.C. Circuit stressed the “weighing of interests” analysis of the particularized need test, rather than whether the union’s need for information fit into one of the specified examples contained in *NLRB v. FLRA*.⁶⁰

These subsequent decisions clearly indicate that the D.C. Circuit did not intend to identify the only two ways a union could meet the particularized need test. Instead, the D.C. Circuit merely provided some examples of how a union could meet the test.

The FLRA’s Adoption of the Particularized Need Test

The FLRA did not adopt the D.C. Circuit’s particularized need test until almost two years later.⁶¹ The FLRA had opportunities to adopt the test earlier. For example, in *U.S. Border Patrol & National Border Patrol Council*, the FLRA noted that the D.C. Circuit had developed a particularized need test for internal management information,⁶² the FLRA indicated that it had not decided whether to adopt the test.⁶³

In *Border Patrol*, the FLRA applied the particularized need test. The FLRA analyzed whether the union’s request for a proposal letter—which constituted internal management infor-

⁵⁵ See *supra* notes 53 and 54. However, in several decisions the FLRA has implied that additional circumstances could exist (beyond the two examples set forth in *NLRB v. FLRA*), which would satisfy the particularized need test. The FLRA has yet to describe what additional circumstances would satisfy the test. See *United States Army Armament Research, Development and Engineering Center & NFFE*, 49 FLRA 77, 83 (1994); *Department of Health and Human Services & NTEU*, 49 FLRA 61, 71 n.6 (1994); *United States Customs Service & NTEU*, 48 FLRA 1239, 1243 (1993).

⁵⁶ *NLRB v. FLRA*, 952 F.2d at 533. The restrictive nature of the particularized need test also is demonstrated by the D.C. Circuit’s statement that “[a]t least where the union has a grievable complaint covering the predecisional text, the union may have a particularized need for disclosure.” *Id.* at 534.

⁵⁷ This is the FLRA’s position as well. For example, in *Department of Health and Human Services & NTEU*, the FLRA stated:

[W]e find that the undisclosed portions of the Report fit neither of the examples set forth by the court in *NLRB v. FLRA* for demonstrating particularized need for intramanagement documents. In such circumstances, the court counsels that section 7114(b)(4) “normally will not require disclosure.” Thus, we conclude that the entire Report is not necessary, within the meaning of section 7114(b)(4) of the Statute, and that Respondent’s failure to furnish the entire Report to the Union did not violate the Statute.

Department of Health and Human Services & NTEU, 49 FLRA at 71.

⁵⁸ See *supra* notes 53 and 54.

⁵⁹ *NLRB v. FLRA*, 952 F.2d at 533.

⁶⁰ See *Department of Air Force v. FLRA*, 956 F.2d 1223 (D.C. Cir. 1992); *DOJ v. FLRA*, 988 F.2d 1267 (D.C. Cir. 1993); *DOJ v. FLRA*, 991 F.2d 285 (5th Cir. 1993). For a complete discussion of these cases, see *infra* text accompanying notes 81-94.

⁶¹ The FLRA adopted the particularized need test in *National Park Service & Police Ass’n of the District of Columbia*, 48 FLRA 1151 (1993). This decision was decided on December 27, 1993. The *NLRB v. FLRA* decision was decided on January 7, 1992.

⁶² 47 FLRA 684, 689 (1993). This case was decided on May 21, 1993.

⁶³ *Id.* See also *DOJ & American Federation of State, County and Municipal Employees*, 45 FLRA 1022, 1024 n.4 (1992) (the FLRA found it unnecessary to address the applicability of *NLRB v. FLRA* because the union did not need the information to carry out its representational functions).

mation—was “necessary” under § 7114(b)(4). The union had requested a proposal letter which contained recommendations for disciplinary action against a bargaining unit employee. The proposal letter preceded the issuance of a final decision which suspended the employee. The union received a copy of the final decision, but argued that it was “of little use to the Union without the proposal letter because the final decision letter does not set forth the facts upon which the disciplinary action was predicated.”⁶⁴

The FLRA found that the union had demonstrated a clear need for the proposal letter.⁶⁵ Additionally, the FLRA noted that the agency had asserted no countervailing interest against disclosure. The FLRA concluded that the proposal letter was “necessary” under § 7114(b)(4)(B) and ordered the agency to disclose it.⁶⁶

In *National Park Service & Police Ass'n of the District of Columbia*,⁶⁷ the FLRA formally adopted the particularized need test when it applied the particularized need test to a union request for disciplinary recommendations and for sick leave recommendations. In applying the test to disciplinary recommendations, the FLRA determined that the union had demonstrated a particularized need for the internal management information.⁶⁸ The FLRA reached this conclusion by finding that the union had a “grievable complaint” covering

the requested disciplinary documents (*i.e.*, they fit into the first example set forth by the D.C. Circuit in *NLRB v. FLRA*).⁶⁹ Accordingly, the FLRA found that the disciplinary recommendations were “necessary” under § 7114(b)(4) and ordered the agency to release them to the union.⁷⁰

With respect to the union’s request for sick leave recommendations, the FLRA determined that the union was unable to establish a particularized need for the documents. The FLRA found that the union had no “collectively-bargained or otherwise grievable interest in the process by which such recommendations were developed.”⁷¹ Because the union did not have a “grievable complaint” covering the requested sick leave recommendations (*i.e.*, they did not fit into the first example set forth by the D.C. Circuit in *NLRB v. FLRA*), disclosure was not “necessary” under § 7114(b)(4).

Although the FLRA did not discuss the countervailing antidisclosure interest of the agency, it stated that “a finding of particularized need constitutes a finding of necessity under the [FSLMRS].”⁷² Apparently, the FLRA’s analysis focused only on whether it believed that the union had demonstrated a particularized need.⁷³

This approach, however, is inconsistent with *NLRB v. FLRA*. The D.C. Circuit required that the agency’s counter-

⁶⁴ *Border Patrol*, 47 FLRA at 686.

⁶⁵ *Id.* at 689.

⁶⁶ *Id.* at 689-90.

⁶⁷ 48 FLRA 1151 (1993). The FLRA stated:

We adopt the court’s decision in *NLRB v. FLRA* and conclude that an agency is not obligated to provide a union with requested documents containing advice, guidance, counsel, or training materials provided for management officials [internal management information] under section § 7114(b)(4) of the Statute unless the union demonstrates a particularized need, as discussed by the court, for such information. Previous inconsistent Authority decisions will no longer be followed.

Id. at 1160. *National Park Service* was one of the three cases that the D.C. Circuit (in *NLRB v. FLRA*) remanded to the FLRA. On remand, the FLRA determined that the record was insufficient to make a determination under the particularized need test. Thus, the FLRA remanded the case to the administrative law judge for further proceedings. See *National Park Service*, 44 FLRA 1537 (1992). The administrative law judge’s decision was “appealed” which is why the case was returned to the FLRA. See *National Park Service & Police Ass'n*, 48 FLRA at 1151-52.

⁶⁸ *National Park Service & Police Ass'n*, 48 FLRA at 1161.

⁶⁹ The FLRA determined that the requested disciplinary documents met the Situation 1 example used by the D.C. Circuit in *NLRB v. FLRA*. See *supra* note 53. The FLRA found that the collective bargaining agreement established a procedure for the maintenance and disclosure of documents contained in an employee’s complaint file. Because the disputed disciplinary documents were placed in the employee’s complaint file, the union “needed” the documents to “know whether the agency complied with the collective bargaining agreement.” *Id.* at 1164. The FLRA apparently stretched its rationale to fit these documents into one of the D.C. Circuit’s “examples.”

⁷⁰ *Id.* at 1164. However, because the grievances filed over the disciplinary actions for which the union requested the disciplinary recommendations had been resolved, the FLRA did not require the agency to release the information. *Id.* at 1165.

⁷¹ *Id.* at 1165.

⁷² *Id.* at 1161 n.8. The FLRA was more concerned with fitting the union’s “need” into one of the examples set forth by the D.C. Circuit in *NLRB v. FLRA*. See *supra* note 69. By so doing, the FLRA knew that the particularized need test would be met. For a discussion on this point, see *supra* text accompanying notes 55-59.

⁷³ In conducting its analysis, the FLRA apparently concluded that the union’s claim of necessity outweighed the agency’s countervailing antidisclosure interest. If so, then the FLRA’s statement that the union demonstrated a particularized need makes sense.

vailing antidisclosure interest "must be weighed against a union claim of necessity under § 7114(b)(4)(B)."⁷⁴ In *National Park Service*, the FLRA should have identified the agency's countervailing antidisclosure interest. Then, the FLRA should have weighed that interest against the union's claim of necessity. The FLRA could have concluded that the union had demonstrated a particularized need which warranted the disclosure of the internal management information.

When compared to the FLRA's approach, this approach may be merely a matter of semantics because both reach the same final conclusion. The better approach is to conduct a full analysis in each decision, as specified by the D.C. Circuit. In that way, the FLRA will provide informative guidance to the administrative law judges who must analyze these issues in the future.⁷⁵

The Applicability of the Particularized Need Test Outside the Context of Internal Management Information

An examination of this issue must begin with *NLRB v. FLRA*.⁷⁶ In *NLRB v. FLRA*, the D.C. Circuit repeatedly emphasized the need for the particularized need test for internal management information.⁷⁷ Because of the unique nature of internal management information—which consists of pre-decisional and deliberative documents—the D.C. Circuit recognized an agency's countervailing antidisclosure interest. According to the D.C. Circuit, the union's need for the infor-

mation, therefore, must be weighed against the agency's antidisclosure interest.⁷⁸

The "weighing of interests" is tantamount to the particularized need test. However, the D.C. Circuit appeared to sanction a different test for information when an agency may have no antidisclosure interest, (*i.e.*, information other than internal management information). For information other than internal management information, the D.C. Circuit referred to a "liberal standard for assessing the relevancy of the requested information."⁷⁹

In *NLRB v. FLRA*, the D.C. Circuit appeared to indicate that the particularized need test applied *only* to union requests for internal management information. Yet, in *Department of Air Force v. FLRA*,⁸⁰ the D.C. Circuit indicated that the particularized need test should be applied to all requests for information under § 7114(b)(4).⁸¹

In *Department of Air Force v. FLRA*, the D.C. Circuit examined a union's request for a document that did not constitute internal management information. The union sought a disciplinary letter that the agency "sent to a supervisor against whom a union member had filed a grievance."⁸² In examining the FLRA's determination to release this document, the D.C. Circuit stated:

As in the *NLRB v. FLRA* cases, the Authority applied a standard of relevance, rather

⁷⁴ *NLRB v. FLRA*, 952 F.2d 523, 532 (D.C. Cir. 1992). See *supra* note 49 and accompanying text.

⁷⁵ An excellent example of a full particularized need analysis occurred in *United States Border Patrol & National Border Patrol Council*, 47 FLRA 684 (1993). See *supra* text accompanying notes 62-66. Ironically, the FLRA conducted a "proper" analysis in a case in which it remarked that it had not decided whether to even adopt the particularized need test. *Id.*

⁷⁶ *NLRB v. FLRA*, 952 F.2d at 523.

⁷⁷ For example, the D.C. Circuit stated that "there must be a particularized showing for information on 'guidance,' 'advice,' 'counsel' or 'training' provided for management officials if such information is not otherwise exempt under section (b)(4)(C)." *Id.* at 525. The D.C. Circuit also stated "[w]here the information sought pertains to 'guidance,' 'advice,' 'counsel' or 'training' provided for management officials, 'necessity' means that there must be a particularized need in order to justify disclosure under subsection (b)(4)(B)." *Id.* at 529. The D.C. Circuit specifically held "that 'guidance,' 'advice,' 'counsel' or 'training' for management officials that is claimed to be necessary for 'full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining' should be released on union request only in those circumstances when the union has a particularized need for the information." *Id.* at 532.

⁷⁸ *Id.* at 532.

⁷⁹ *Id.* at 531. In this regard the D.C. Circuit stated:

In weighing the employer's duty to furnish information under subsection (b)(4)(B), the requisite strength of the union's "need" will depend on the intensity of countervailing interests. "In some instances, the concepts of relevancy and necessity may, indeed, merge indistinguishably; whereas in others, they may remain distinct." For example, in *North Germany Area Council, Overseas Educ. Ass., v. FLRA*, 805 F.2d 1044, 1048 (D.C. Cir. 1986), we spoke of the Statute's [FSLMRS] "liberal standard for assessing the relevancy of the requested information"; in that case there was no anti-disclosure interest. In a case of this sort, however, involving information on "guidance," "advice," "counsel" or "training" provided for management officials, we know that there is some countervailing anti-disclosure interest because of the existence of subsection (b)(4)(C).

Id. (emphasis added) (citations omitted).

⁸⁰ 956 F.2d 1223 (D.C. Cir. 1992).

⁸¹ *Id.* at 1224-25. This decision was rendered less than two months after *NLRB v. FLRA*. The D.C. Circuit remanded the case to the FLRA to apply the particularized need test as required by its decision of *NLRB v. FLRA*. *Id.* at 1225.

⁸² *Id.* at 1224.

than necessity, contrary to the statute's requirement. In finding that disclosure of the disciplinary letter was "necessary," the Authority considered only the interests favoring disclosure, stating merely that the union needed the letter to evaluate the grievance, decide whether to pursue it, and to prepare for arbitration proceedings. But as the Court stated in *NLRB v. FLRA*, "[i]f only pro-disclosure were material to § 7114(b)(4)(B), the statutory factor of 'necessity' would be surplusage." The Authority should have considered countervailing interests against disclosure, and because it did not do so we remand for reconsideration.⁸³

The D.C. Circuit had another opportunity to address the applicability of the particularized need test outside the context of internal management information. In *DOJ v. FLRA*,⁸⁴ the D.C. Circuit provided its strongest statement that the particularized need test applied to all requested information under § 7114(b)(4).

The D.C. Circuit reviewed the FLRA's determination that agency crediting plans were "necessary" under § 7114(b)(4).⁸⁵

The FLRA asserted that the particularized need test should not apply to crediting plans because they contained objective, nonpersonal data. Despite the FLRA's argument to the contrary, the D.C. Circuit stated that the "FSLMRS does not distinguish between 'predecisional, deliberative data' and 'objective, non-personal data.'"⁸⁶ The D.C. Circuit further stated that "the necessity requirement stipulated in section 7114(b)(4)(B) is unitary."⁸⁷

In *DOJ v. FLRA*, the D.C. Circuit "made it clear that § 7114(b)(4)(B) requires a union to demonstrate a 'particularized need' for information it seeks."⁸⁸ In this regard, the D.C. Circuit noted "[i]n evaluating whether a union has satisfied this standard, the Authority must consider (1) the union's particularized need for the requested information sought, and (2) the countervailing antidisclosure interests of the agency."⁸⁹ Thus, according to the D.C. Circuit in *DOJ v. FLRA*, the FLRA must apply the particularized need test to all information requested under § 7114(b)(4).⁹⁰

This view is not limited to the D.C. Circuit. In *DOJ v. FLRA*, the Fifth Circuit also determined that the particularized need test applied outside the context of internal management information.⁹¹ The Fifth Circuit examined a union's request for several types of information.⁹² The Fifth Circuit agreed with the D.C. Circuit's approach to weigh the union's need

⁸³*Id.* The court's real concern appeared to be protecting the privacy interests of the supervisor. *Id.* at 1225. However, the court did not address the agency's determination that the disclosure of the disciplinary letter was "not prohibited by law," *i.e.*, the Privacy Act.

⁸⁴988 F.2d 1267 (D.C. Cir. 1993).

⁸⁵*Id.* at 1268. "A crediting plan typically consists of a list of criteria reflecting the knowledge, skills, and other characteristics deemed necessary for a particular job, as well as devices used to measure whether a candidate satisfies those criteria." *Id.* Interestingly, in another case, the D.C. Circuit held that crediting plans were exempt from disclosure under the Freedom of Information Act "because they 'related solely to the internal personnel rules and practices of an agency.'" *Id.* at 1269.

⁸⁶*Id.* at 1270. The FLRA argued that an agency's countervailing interest against disclosure should not be considered in cases involving crediting plans. In support of this argument, the FLRA attempted to distinguish "predecisional, deliberative management information" which required the particularized need test, from crediting plans, which involved "objective, non-personal data." *Id.*

⁸⁷*Id.*

⁸⁸*Id.* at 1270.

⁸⁹*Id.*

⁹⁰The D.C. Circuit concluded its decision by stating: "§ 7114(b)(4)(B), as explained in *NLRB* and *Air Force*, requires the FLRA to determine whether a union has demonstrated a particularized need for the information." *Id.* at 1272. The D.C. Circuit remanded the case to the FLRA to conduct the particularized need test. On remand, the FLRA adopted the D.C. Circuit's decision and remanded the case to the administrative law judge for further proceedings in light of the D.C. Circuit's decision. See *DOJ & AFGE*, 49 FLRA 597 (1994). By adopting the D.C. Circuit's decision, the FLRA implicitly agreed that the particularized need test applied to all information requests. In light of Member Talkin's dissent in *National Park Service & Police Ass'n of the District of Columbia*, 48 FLRA 1151, 1170 (1993), see *supra* note 5, it is curious that she did not voice any objection to the FLRA's adoption of the D.C. Circuit's decision.

⁹¹991 F.2d 285 (5th Cir. 1993). For the Fifth Circuit's analysis on the FLRA's interpretation of the "necessary" requirement of § 7114(b)(4)(B), see *supra* note 43.

⁹²The union had requested: (1) performance appraisals of employees; (2) all documents contained in the Employee Performance Files; (3) all documents contained in the Supervisory Work Folders; and (4) copies of any and all documents and reports that certain employees completed during a two-year period. *DOJ v. FLRA*, 991 F.2d at 287. Some of this information would qualify as "internal management information," however, a great portion would not. The Fifth Circuit noted that the union's request encompassed between 5000 and 6000 documents located at various sites in the United States and in other countries. As a result, the Fifth Circuit determined that the information was not "reasonably available." *Id.* at 291-92; see also *supra* note 9 and accompanying text.

against the agency's countervailing interest in nondisclosure.⁹³

The FLRA must decide whether to apply the particularized need test to all requests for information under § 7114(b)(4). The FLRA recently issued five orders directing the parties to file briefs on "whether a different standard should be applied to requests for [information other than internal management information]."⁹⁴ As a result, it is only a matter of time before the FLRA issues decisions which reflect its view on this issue.

Regardless of whether the FLRA decides to apply the particularized need test to requests for all information under § 7114(b)(4), the D.C. and Fifth Circuit will apply the test.

The Appropriateness of the Particularized Need Test

In *National Park Service*,⁹⁵ Member Talkin disagreed with her colleagues and the D.C. Circuit concerning the application of the particularized need test. Specifically, Member Talkin disagreed that a determination of necessity must "take into account *in all cases* the countervailing interests of the agency."⁹⁶ Instead, she asserted that the plain language of § 7114(b)(4)(B) mandates that, "in assessing necessity, our [the FLRA's] focus must be on the uses to which the requesting union would put the information."⁹⁷

Instead of the particularized need test, Member Talkin advocated a new definition of "necessary" to be used in all requests for information, not just for internal management information.⁹⁸ Member Talkin defined "necessary" as follows:

I would construe the term "necessary" in section 7114(b)(4)(B) to apply to requested information that a reasonable person would find to be material, in addition to relevant and useful, to the unions's stated purpose and the conduct of its representational responsibilities. *Under my formulation, requested information would be material if one could discern either from the request itself or from the context in which it was made that, when viewed objectively, the information could influence or affect the union's choice or pursuit of a course of action in the context of fulfilling its representational responsibilities under the Statute.* In my view, this standard goes well beyond a finding of mere relevance, which requires only that the requested information be germane, or pertinent, to the function for which it is sought.⁹⁹

However, in *NLRB v. FLRA*, the D.C. Circuit initially fashioned a test of necessity for internal management information.¹⁰⁰ In developing the test, the D.C. Circuit noted the unique nature of predecisional, deliberative documents.

The D.C. Circuit recognized that with these documents an agency countervailing antidisclosure interest would exist. The antidisclosure interest would tend to "encourage confidential, frank self-analysis on the part of the employer."¹⁰¹ To determine whether internal management information is "necessary," the agency's countervailing interests should be considered.

⁹³ *DOJ v. FLRA*, 991 F.2d at 291 n.3.

⁹⁴ See *INS & AFGE*, 50 FLRA No. 8 (1994); *IRS & NTEU*, 50 FLRA No. 9 (1994); *United States Dep't of Health and Human Services & AFGE*, 50 FLRA No. 10 (1994); *Social Security Administration & AFGE*, 50 FLRA No. 11 (1994); *Federal Bureau of Prisons & AFGE*, 50 FLRA No. 12 (1994). In each order, the FLRA stated that in *National Park Service*:

the Authority adopted the standard set forth in [*NLRB v. FLRA*], for determining when requested information involving advice, guidance, counsel or training provided for management officials is necessary. The Authority is now considering the application of the *National Park Service* standard to pending cases, including whether a different standard should be applied to requests for other types of information. In that context, the parties are directed to file, by January 6, 1995, briefs with the Authority . . .

⁹⁵ *National Park Service & Police Ass'n*, 48 FLRA at 1168.

⁹⁶ *Id.* Interestingly, Member Talkin participated in *United States Border Patrol* without raising any objection about the application of the particularized need test. In that case, in applying the particularized need test, the FLRA fully considered the countervailing interest of the agency. See *supra* text accompanying notes 62-66.

⁹⁷ *National Park Service & Police Ass'n*, 48 FLRA at 1168.

⁹⁸ Member Talkin recognized that "the Authority has often applied its previous standard for determining necessity under section 7114(b)(4)(B) too broadly [*i.e.*, equating "necessary" with "relevant"] and that a more precise definition of that term may be needed." *Id.* at 1170.

⁹⁹ *Id.* (emphasis added).

¹⁰⁰ See *supra* note 77.

¹⁰¹ *NLRB v. FLRA*, 952 F.2d 523, 532 (D.C. Cir. 1992) (quoting *International Union of Elec. Radio & Mach. Workers v. NLRB*, 648 F.2d 18, 28 (D.C. Cir. 1981)); see *supra* note 48.

As demonstrated, subsequent D.C. Circuit decisions have shown that the particularized need test applies to all requests for information under § 7114(b)(4). The D.C. Circuit noted that an agency also may have a countervailing nondisclosure interest in information other than internal management information. To obtain this information, a union must set forth a legitimate need for the information as required by § 7114(b)(4)(B). The union's "need" for the requested information must then be weighed against the agency's countervailing nondisclosure interest.

Member Talkin's definition of "necessary" supports a contrary view. She believes that the union's "need" for information could be determined objectively.¹⁰² Under Member Talkin's definition, she would remove the duty of a union to explain its "need," as required by the particularized need test. Instead, she would require an agency to attempt to discern the union's "need" for information from the request itself.

Under Member Talkin's definition, she would require that the union's request for information be "viewed objectively" to determine whether the "information could influence or affect the union's choice or pursuit of a course of action."¹⁰³ In essence, Member Talkin equates "necessary" with "relevant." Member Talkin does not propose a new definition of "necessary," but rather restates the FLRA's original interpretation of "necessary."

The key component of the particularized need test is the duty of a union to articulate a "need" for requested information. The union has the burden to come forward with a sufficient need that warrants disclosure. This requirement is reasonable given the statutory language which mandates disclosure of only "necessary" information. Moreover, it does not put the agency in an awkward position of attempting to divine the union's need for requested information.

Regarding the union's need for requested information, the FLRA should, in assessing necessity, focus on "the uses to which the requesting union would put the information."¹⁰⁴ An identification of the "uses" of the information will determine the strength of the union's need for the information. If the

union has demonstrated a strong need, disclosure should occur unless there is a stronger countervailing nondisclosure interest. In all cases, however, and in disagreement with Member Talkin, an agency's countervailing nondisclosure interest must be considered.

A good example of an agency's nondisclosure interest in information outside the context of internal management information can be found in *Department of Air Force v. FLRA*.¹⁰⁵ In this case, the union sought a disciplinary letter that the agency "sent to a supervisor against whom a union member had filed a grievance."¹⁰⁶ The union's request did not involve internal management information.

In these circumstances, a union may be able to articulate a strong "need" for disciplinary documents. As the D.C. Circuit noted, however, the agency would have a countervailing antidisclosure interest in protecting the secrecy and confidentiality of its disciplinary decisions. Thus, the agency's countervailing nondisclosure interest "must be weighed against [the] union's claim of necessity under § 7114(b)(4)(B)."¹⁰⁷ Otherwise, without considering the agency's countervailing interest, the FLRA would resort to the old standard which allowed disclosure if the union felt the information would be "useful" to a possible grievance.

One way to conceptualize the particularized need test is to place an agency's countervailing interest on a sliding scale. All union requested information can be placed on a countervailing nondisclosure interest continuum. On one end, is an agency's interest in nondisclosure which is so overwhelming that it fits into the § 7114(b)(4)(C) exemption. At this extreme end of the continuum, Congress recognized that disclosure of intramanagement information is not required no matter how strong the union's need.

On the opposite end of the continuum is information where no agency countervailing nondisclosure interest exists. This information easily can be released to the union. Most requests for information, however, fall in the middle of the continuum; some identifiable agency countervailing nondisclosure interest or an articulable union "need" for the information usually is

¹⁰² According to Member Talkin:

Under my formulation, requested information would be material if one could discern either from the request itself or from the context in which it was made that, when viewed objectively, the information could influence or affect the union's choice or pursuit of a course of action in the context of fulfilling its representational responsibilities under the Statute.

Id. at 1170.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1168.

¹⁰⁵ 956 F.2d 1223 (D.C. Cir. 1992). See *supra* notes 80-83 and accompanying text.

¹⁰⁶ *Id.* at 1224.

¹⁰⁷ *NLRB v. FLRA*, 952 F.2d 523, 532 (D.C. Cir. 1992).

present. In this middle area is where the "weighing of interests" analysis is crucial.

The particularized need test is appropriate to determine whether requested information is "necessary" under § 7114(b)(4)(B). The key to the particularized need test is the "weighing of interests" analysis. Moreover, for the reasons discussed, the FLRA should not rely exclusively on the two examples set forth by the D.C. Circuit in *NLRB v. FLRA*.

The FLRA should conduct a "weighing of interests" analysis in all requests for information under § 7114(b)(4). As a result of recent federal decisions—which stressed the "weighing of interests" analysis—the FLRA will determine there are additional circumstances, in addition to the two examples in *NLRB v. FLRA*, that meet the particularized need test.

Conclusion

As demonstrated, the FLRA's interpretation of the necessary requirement of § 7114(b)(4)(B), which equated "necessary" with "relevant," was unreasonable. To correct this situation, the D.C. Circuit developed the particularized need test.

The FLRA has now adopted the particularized need test.¹⁰⁸ To make it work, the FLRA will have to focus primarily on the "weighing of interests," rather than trying to fit a union's request for information into one of the D.C. Circuit's two examples. The "weighing of interests" analysis is now the focal point of the federal court decisions decided after *NLRB v. FLRA*.

The FLRA should apply the particularized need test outside the context of internal management information.¹⁰⁹ Union requests for all types of information should be examined under the "weighing of interests" analysis. Agencies also have countervailing nondisclosure interests in documents other than internal management information. The agency's nondisclosure interest must be weighed against the union's claim of necessity under § 7114(b)(4)(B).

The particularized need test ensures that "necessary" information, as required by § 7114(b)(4)(B), is disclosed to the exclusive representative. It properly places the burden on a union to demonstrate a "need" for the requested information. In short, the particularized need test restores some order to the complicated area of "union access to information."

¹⁰⁸The FLRA may change its position on the adoption and use of the particularized need test. This is unlikely, however, given the FLRA's adoption of the test and that the FLRA recently ordered the submissions of briefs on whether the test should be extended to all requests to information under § 7114(b)(4). See *supra* note 94.

¹⁰⁹To date, the FLRA has only applied the particularized need test to requests for internal management information. See Department of Health and Human Services, 49 FLRA 61, 69-70 (1994); Department of Air Force & AFGE, 49 FLRA 603, 1994 WL 99966 at *1, *5 (1994); Sacramento Air Logistics Center & AFGE, 49 FLRA 1224, 1994 WL 258406 at *1, *5 (1994). But see *supra* note 90. However, the FLRA recently ordered the submissions of briefs on whether the particularized need test should apply outside the internal management information area.

Violations of the Antideficiency Act: Is the Army Too Quick to Find Them?

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Introduction

Congress has the power of the purse: it controls the flow of appropriated funds (public money) from the Treasury to government agencies,¹ including the Army. Pursuant to its legislative power, Congress uses appropriations acts,

authorization acts, and permanent statutes to impose limitations on the Army's obligation and expenditure of appropriated funds.

The Antideficiency Act² provides the "teeth" for those limitations which can "bite" soldiers and Army civilian employ-

¹"No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7.

²31 U.S.C. §§ 1341-1342, 1349-1351, 1511-1519 (West 1983 & Supp. 1994).

ees.¹ Violations of the Antideficiency Act require reports to the President and Congress, and have the potential for both adverse personnel actions and criminal penalties.

The General Accounting Office (GAO) assists with enforcing congressional limitations. Part of the GAO's mission is to investigate all matters related to the obligation and expenditure of appropriated funds and report to Congress.³ The Comptroller General, as head of the GAO, renders decisions on questioned fiscal practices that are binding on the Executive Branch⁴ and are of value as legal precedent.⁵ By understanding and following the principles of law in the GAO's decisions, Army officials responsible for appropriated funds will know how the GAO and Congress would view its obligation and expenditure practices, and how to avoid Antideficiency Act violations.

In addition to statutes and the legal principles of GAO decisions, the Army has promulgated a regulation,⁶ *Army Accounting and Fund Control*, that provides agency-specific guidance for the obligation and expenditure of appropriated funds. This regulation is more restrictive than the statutory limitations and the GAO's interpretations. Although the Army has the right to be more conservative in its management of appropriated funds, its unduly restrictive regulation can cause the Army to suspect and report Antideficiency Act violations where no violations actually exist, resulting in unnecessary suffering and waste of investigatory resources.

The Antideficiency Act—In General

"The Anti-Deficiency Act is the cornerstone of Congressional efforts to bind the Executive branch of government to

the limits on expenditure of appropriated funds set by appropriation acts and related statutes."⁷

The Antideficiency Act requires the Army to avoid spending too much too fast. Congress gives the Army a certain amount of money per year, and the Army must avoid exhausting those funds before the end of the period (fiscal year or other period of time) for which they are appropriated. The Army must spend appropriations in a measured way that avoids the need to return to Congress for a supplemental or deficiency appropriation.⁸

The law on use of appropriated funds—also known as fiscal law—generally imposes purpose, time, and amount restrictions⁹ on the way that the Army spends money. The Antideficiency Act, with its potential for adverse personnel actions and criminal penalties, is that part of fiscal law that helps enforce compliance with the purpose, time, and amount restrictions.¹⁰

The Antideficiency Act is a series of scattered statutes. One statute prohibits expenditures and obligations that exceed amounts available in an appropriation and contracting in advance of an appropriation.¹¹ While another prohibits government acceptance of voluntary services, except for emergencies.¹² A series of seven statutes requires apportionment and administrative subdivision of funds, and prohibits expenditures or obligations in excess of apportionments and administrative subdivisions.¹³ Other statutes authorize adverse personnel actions¹⁴ and criminal penalties¹⁵ for those who violate the substantive provisions. One statute requires agencies to report to the President and Congress all incidents of expen-

³ See, e.g., *id.* § 712 (West 1983) (investigating the use of public money).

⁴ U.S. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-27 n.42 (2d ed. 1991) [hereinafter PRINCIPLES].

⁵ See *id.* at 1-26 to 1-29.

⁶ DEP'T OF ARMY, REG. 37-1, ARMY ACCOUNTING AND FUND CONTROL (30 Apr. 1991) [hereinafter AR 37-1].

⁷ Gary L. Hopkins & Robert M. Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 MIL. L. REV. 51, 56 (1978).

⁸ Honorable John D. Dingell, House of Representatives, B-218800, 64 Comp. Gen. 728, 735 (1985). The Interstate Commerce Commission met this requirement, because it had an emergency plan to enable it to operate for an entire fiscal year without a supplemental appropriation.

⁹ PRINCIPLES, *supra* note 4, at 4-2.

¹⁰ *Id.* at 6-3.

¹¹ 31 U.S.C. § 1341 (West 1983 & Supp. 1994).

¹² *Id.* § 1342 (West Supp. 1994).

¹³ *Id.* §§ 1511-1517 (West 1983 & Supp. 1994).

¹⁴ *Id.* § 1349 (West 1983) (for violations of §§ 1341(a), 1342, 1344); *id.* § 1518 (West 1983) (for violations of § 1517(a) only). Both statutes authorize suspension without pay or removal from office.

¹⁵ *Id.* § 1350 (West 1983) (for violations of §§ 1341(a), 1342); *id.* § 1519 (West 1983) (for violations of § 1517(a) only). Both statutes authorize fines of not more than \$5000, or imprisonment for not more than two years, or both.

ditures or obligations that exceed available amounts, and all incidents of acceptance of voluntary services.¹⁶

This article will examine only one Antideficiency Act statute: 31 U.S.C. § 1341(a), the prohibition against expenditures and obligations that exceed amounts available in an appropriation or fund.

Limitations on Expending and Obligating Amounts

Congress has prohibited expenditures¹⁷ or obligations¹⁸ that exceed amounts available in appropriations or funds for those expenditures or obligations.¹⁹ An agency must not spend more money than it has available in its appropriation or fund. However, that is not all the law requires; "the Antideficiency Act prohibits not only expenditures which exceed the amount appropriated, but also expenditures which violate statutory restrictions or limitations on obligations or spending."²⁰ Under the Antideficiency Act, having enough money is important, but so is following the rules.

When preparing to expend or obligate funds, the Army must determine which funds Congress allows it to use for the particular object or purpose at issue. Funds are not "available" for expenditure or obligation, under 31 U.S.C. § 1341(a), if the planned use of the funds violates the law.²¹

Executive agencies determine which funds are available by application of the purpose, time, and amount limitations²² that appear in appropriations acts, authorization acts, and permanent statutes. The Army only can expend (pay) or obligate

(promise to pay) the amounts that are available under those rules.

Purpose Violations Can Violate the Antideficiency Act

The Purpose Statute²³ provides that appropriations are available for expenditure or obligation only for the purposes for which Congress appropriates them.²⁴ Although the statute seems simple, the law in this area is voluminous and complex. In general, Congress labels each appropriation as being available only for a specific purpose—which may be broad or narrow—and then the Army is bound to use the money for only that purpose.

This is not a simple matter for the Department of Defense (DOD), which has hundreds of different appropriations available to it. The major categories of appropriations in DOD appropriations acts (that apply to the Army) are Military Personnel, Operation & Maintenance (O&M), Procurement, and Research, Development, Test, and Evaluation (RDT&E).²⁵ Congress appropriates the military construction funds by a separate act.²⁶

Generally, there are three ways that government agencies (including the Army) can violate the Purpose Statute:

- (1) Using the wrong appropriation for an otherwise-authorized expenditure (e.g., using a Procurement appropriation to pay Personnel (military pay) costs).

¹⁶*Id.* § 1351 (West 1983). The head of the agency must report "all relevant facts and a statement of actions taken." *Id.*

¹⁷"A payment by check or equivalent action that constitutes a charge against the appropriation cited." AR 37-1, *supra* note 6, glossary, sec. II.

¹⁸"Amounts of orders placed, contracts awarded, services rendered, or other commitments made by Federal agencies during a given period that will require outlay during the same or some future period." *Id.*

¹⁹An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law . . .

31 U.S.C. § 1341(a)(1) (West Supp. 1994).

²⁰Customs Service Payment of Overtime Pay in Excess of Limit in Appropriation Act, B-201260, 60 Comp. Gen. 440, 442 (1981) (payment of overtime compensation in excess of \$20,000 to an individual violated an appropriation act ceiling, and therefore violated the Antideficiency Act); Reconsideration of B-214172, B-214172, 64 Comp. Gen. 282, 289 (1985) (expenditures or obligations in excess of a limitation in authorizing legislation would also violate the Antideficiency Act).

²¹Reconsideration of B-214172, 64 Comp. Gen. 282, 288 (1985).

²²PRINCIPLES, *supra* note 4, at 4-2.

²³"Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a) (West 1983).

²⁴*Id.*

²⁵*See, e.g.*, Dep't of Defense Appropriations Act, 1995, Pub. L. No. 103-335, 2599, 1994 U.S.C.C.A.N. (108 Stat.) 2599.

²⁶*See, e.g.*, Military Construction Appropriations Act, 1995, Pub. L. No. 103-307, 1994 U.S.C.C.A.N. (108 Stat.) 1659.

(2) Using any appropriation for an unauthorized expenditure. An example is expenditure of appropriated funds for employees' food and entertainment at their home duty station, which is generally a personal expense.²⁷

(3) Using an appropriation for a purpose that Congress has explicitly prohibited in an appropriations act, authorization act, or permanent statute.

When Congress wants to prevent an agency from doing something, it uses its power of the purse by specifically limiting the appropriations to provide that none of the funds may be used for that forbidden purpose. The DOD appropriations acts contain a number of these limitations. Some recent examples include the prohibition on use of cats for brain missile wound research,²⁸ and the restriction on purchasing lifeboat survival systems that are not predominantly manufactured and assembled in the United States.²⁹

Whenever an agency violates the Purpose Statute, it is not using the funds for the purposes for which Congress appropriated them. Some Purpose Statute violations also violate the Antideficiency Act. The Comptroller General has stated:

When an agency's appropriation is not available for a designated purpose, and the agency has no other funds available for that purpose, any officer of the agency who authorizes an obligation or expenditure of agency funds for that purpose violates the Antideficiency Act. 31 U.S.C. § 1341(a). *If no other funds [are] available . . . the obligation could be viewed as either in excess of the amount (zero) available for that purpose or as in advance of appropriations made for that purpose. In either case, the obligation [violates] the Antideficiency Act, and appropriate action should be taken . . .*³⁰

This statement accurately summarizes the law. A violation of the Purpose Statute also will violate the Antideficiency Act, if "the agency has no other funds available for that purpose."³¹ Availability of "other funds" is critical, because the "other funds" may correct the mistake.

The GAO addressed this issue in, *The Honorable Bill Alexander, United States House of Representatives*.³² As part of the Ahuas Tara (Big Pine) II combined training exercises in Honduras, the DOD had used O&M funds for construction projects, training of foreign forces, and other projects. The Comptroller General decided that military construction funds, security assistance funds, and other funds (not O&M), were the appropriate funding sources for much of the DOD's activities in Honduras. The Comptroller thus found violations of the Purpose Statute, and observed as follows:

Not every violation of [the Purpose Statute] also constitutes a violation of the Antideficiency Act . . . Even though an expenditure may have been charged to an improper source, the Antideficiency Act's prohibition against incurring obligations in excess or in advance of available appropriations is not also violated *unless no other funds were available for that expenditure*. Where, however, no other funds were authorized to be used for the purpose in question (or where those authorized were already obligated), both [the Purpose Statute] and [the Antideficiency Act] have been violated.³³

Availability of proper funds was important, because the Comptroller concluded that the DOD should correct the Purpose violations by reimbursing the improperly used funding source (O&M) with correct amounts from the proper funding sources.³⁴ Essentially, the Comptroller told the DOD to *correct* the accounts to what they would have been had the DOD correctly acted in the first place. To the extent that correction would result in an over expenditure or an over obligation of the proper accounts, Antideficiency Act violations would result.

²⁷ See, e.g., HUD Gifts, Meals, and Entertainment Expenses, B-231627, 68 Comp. Gen. 226 (1989) (food, gift, and entertainment expenses are essentially personal in nature).

²⁸ Dep't of Defense Appropriations Act, 1995, Pub. L. No. 103-335, § 8038, 1994 U.S.C.A.N. (108 Stat.) 2599, 2638.

²⁹ *Id.*

³⁰ United States Department of Labor—Interagency Agreement Between Employment and Training Administration and Bureau of International Labor Affairs, B-245541, 71 Comp. Gen. 402, 406 (1992) (emphasis added).

³¹ *Id.*

³² B-213137, 63 Comp. Gen. 422 (1984). This decision is sometimes known as *Honduras II*.

³³ *Id.* at 424 (emphasis added).

³⁴ *Id.*

The Comptroller reached a similar result in *Use of Agencies' Appropriations to Purchase Computer Hardware for Department of Labor's Executive Computer Network*.³⁵ The Department of Labor (DOL) purchased computer equipment in violation of the Purpose Statute. The Comptroller stated that the DOL should adjust its accounts, and "[t]o the extent unobligated funds [from the correct funding source] do not remain in such accounts adequate to make the adjustments . . . a violation of the Anti-Deficiency Act has occurred and appropriate reporting . . . should be made."³⁶ Therefore, agencies can correct their Purpose Statute violations, but to the extent there is an insufficient balance in the proper account, they violate the Antideficiency Act.

In *Honorable Dennis P. McAuliffe, Administrator, Panama Canal Commission*,³⁷ at the time of the Comptroller's decision the agency had no proper funds available to correct the Purpose Statute violation. The Comptroller decided that because "current funds are not available to make an accounting adjustment which would replenish the [improperly-charged] account, the Antideficiency Act violation should be reported to the President and the Congress in accordance with 31 U.S.C. § 1351."³⁸ When correcting the Purpose Statute is impossible, there is no escaping the Antideficiency Act's reporting requirements.

The Comptroller will view a Purpose Statute violation as not violating the Antideficiency Act if the agency can correct the accounts. Although the Comptroller is never very specific about internal agency methods of handling funds, apparently agencies must have proper funds available at the time of the improper expenditure or obligation and when it is time to correct:

[R]eimbursement should be made to the [improperly-charged] appropriation, where funds remain available, from the appropriations [that are] the proper funding sources. . . . [W]e would consider an Antideficiency Act violation to have occurred where an expen-

diture was improperly charged and the appropriate fund source, although available at the time, was subsequently obligated, making readjustment of accounts impossible.³⁹

Violation of Statutory Ceilings

Some statutes specify a certain maximum amount, or ceiling, for a particular expenditure, obligation, or object. Exceeding these monetary ceilings could lead to Antideficiency Act violations. There are two types of ceilings: those that are absolute limits, and those that limit the amounts available from a particular appropriation.

Ceilings That Are Absolute Limits

Absolute ceilings often show up in DOD appropriations acts. A recent example is the \$119.2 million limit (from DOD appropriations) for the operating costs of NATO Headquarters.⁴⁰ When Congress states that an agency can expend or obligate no more than a specified amount for a particular object, the agency must strictly observe that ceiling, regardless of how much money it may have in the appropriation. For example, in *Customs Service Payment of Overtime Pay in Excess of Limit in Appropriation Act*,⁴¹ the applicable appropriation act stated that the Customs Service could not pay any employee more than \$20,000 for overtime in Fiscal Year (FY) 1980. The Customs Service paid an employee \$20,194.17 in overtime. Because the ceiling was absolute, the Comptroller decided that the payment was in excess of amounts "available" from the appropriation by \$194.17, and that amount was an Antideficiency Act violation.⁴² Apparently, there is no de minimis exception to an absolute ceiling. When an agency exceeds an absolute ceiling, there are no proper funds "available" for the excess, therefore, no way to correct the violation.

Another Comptroller General decision, *Matter of: Reconsideration of B-214172*,⁴³ reinforces the view that no de min-

³⁵ B-238024, 70 Comp. Gen. 592 (1991).

³⁶ *Id.* at 596.

³⁷ B-222048, 1987 U.S. Comp. Gen. LEXIS 1631 (Feb. 10, 1987).

³⁸ *Id.* at *7.

³⁹ The Honorable Bill Alexander, United States House of Representatives, B-213137, 63 Comp. Gen. 422, 424 (1984).

⁴⁰ Dep't of Defense Appropriations Act, 1995, Pub. L. No. 103-335, § 8074, 1994 U.S.C.A.N. (108 Stat.) 2599, 2635.

⁴¹ B-201260, 60 Comp. Gen. 440 (1981).

⁴² *Id.* at 441.

⁴³ B-214172, 64 Comp. Gen. 283 (1985) (SBA expenditures that exceeded statutory ceilings in authorizing legislation violated Antideficiency Act, as they exceeded available appropriations).

imis exception to an absolute ceiling exists. Furthermore, this decision states something that *Customs Service*⁴⁴ only implies: violation of an absolute ceiling is an Antideficiency Act violation, regardless of the agency's good faith—fault and intent are immaterial.⁴⁵

Ceilings That Are Not Absolute Limits

Congress frequently establishes a limitation on the amount available from a specific appropriation, without imposing an absolute ceiling on expenditures for the desired object. If the expenditure or obligation is over the ceiling amount, the agency must use a different appropriation available to it.

A prime example of this type of ceiling is unspecified (or minor) military construction. For example, the Army can use O&M funds for military construction projects that cost no more than \$300,000.⁴⁶ However, this is not an absolute ceiling for military construction—the Army can undertake military construction projects costing more than \$300,000, if it uses military construction funds.⁴⁷

Therefore, if the Army expends or obligates more than \$300,000 of O&M funds for a military construction project, an Antideficiency Act violation does not automatically result.⁴⁸ Because there is a correct funding source for minor military construction over \$300,000, there will be no Antideficiency Act violation if the Army can reimburse the O&M account (an improper source) with military construction funds (the proper source),⁴⁹ and thereby correct the accounts. Reim-

bursement, if any, would have to be for the entire amount of the project, not just the excess, because the magnitude of the project removes it from the O&M range. There will be an Antideficiency Act violation only if the Army does not correct because it has an insufficient balance in the proper account.⁵⁰ (There still could be violations of other rules that require high-level advance approval.⁵¹)

The Expense/Investment Threshold is another example of a limitation on the amount available from a specific appropriation that is not an absolute ceiling on expenditures for the desired object. "Expense" is the cost of operating the Army; "Investment" is the cost of purchasing capital assets like equipment and systems.⁵² The threshold amount is \$50,000.⁵³ The Army can use O&M funds to buy capital assets if the "investment item unit cost" is not more than the threshold amount; for items costing more, the Army must use procurement funds.⁵⁴

The analysis for the Expense/Investment threshold is the same as for unspecified military construction. There is a statutory ceiling, but it simply means that expenditures or obligations over that ceiling require a different kind of DOD appropriation. If the Army uses O&M funds for an investment item or system that costs more than \$50,000, there is not an automatic Antideficiency Act violation. Because there is a correct funding source (procurement funds), the Army can avoid a violation if it corrects or adjusts the accounts by reimbursement.

⁴⁴ Customs Service Payment of Overtime Pay in Excess of Limit in Appropriations Act, B-201260, 60 Comp. Gen. 440 (1981).

⁴⁵ Reconsideration of B-214172, B-214172, 64 Comp. Gen. 283, 289 (1985).

⁴⁶ 10 U.S.C. § 2805(c)(1) (West Supp. 1994).

⁴⁷ *Id.* § 2805(a)(1) (West Supp. 1994). (Under 10 U.S.C. § 2805, the Army may use O&M funds for projects costing up to \$300,000, and unspecified minor military construction funds for projects costing more than \$300,000 but less than \$1.5 million. The Army may undertake projects costing more than \$1.5 million only as part of the annual Military Construction Appropriations Acts.) See, e.g., The Honorable Bill Alexander, United States House of Representatives, B-213137, 63 Comp. Gen. 422, 437 (1984). (In *The Honorable Bill Alexander*, the Comptroller refers to a \$200,000 maximum for projects funded with O&M; subsequently, Congress has revised 10 U.S.C. § 2805(c) to increase that limit to \$300,000. This change does not affect the reasoning contained in *The Honorable Bill Alexander*.)

⁴⁸ The Honorable Bill Alexander, United States House of Representatives, B-213137, 63 Comp. Gen. 422, 437-38 (1984); *contra* AR 37-1, *supra* note 6, para. 7-6.b.

⁴⁹ The Honorable Bill Alexander, United States House of Representatives, B-213137, 63 Comp. Gen. 422, 437-38 (1984). Cf. DEP'T OF DEFENSE, 7220.9-M, ACCOUNTING MAN., ch. 21, para. E.4.e. (stating that violations of minor military construction limits are violations of the Antideficiency Act, but not mentioning that those violations are correctable).

⁵⁰ The Honorable Bill Alexander, United States House of Representatives, B-213137, 63 Comp. Gen. 422, 437-38 (1984).

⁵¹ 10 U.S.C. § 2805(b) (West Supp. 1994).

⁵² DEP'T OF ARMY, PAMPHLET 37-100-95, FINANCIAL MANAGEMENT: THE ARMY MANAGEMENT STRUCTURE (AMS), FISCAL YEAR 1995, app. A, para. A-C (1 July 1994) [hereinafter DA PAM. 37-100-95].

⁵³ "During the current fiscal year, appropriations which are available to the Department of Defense for operation and maintenance may be used to purchase items having an investment item cost of not more than \$50,000." Dep't of Defense Appropriations Act, 1995, Pub. L. No. 103-335, § 8076, 1994 U.S.C.A.N. (108 Stat.) 2599, 2636.

⁵⁴ *Id.*; DA PAM. 37-100-95, *supra* note 52.

Violations of the Bona Fide Needs Rule

The Comptroller General has provided many decisions over the years that interpret the Bona Fide Needs Rule as part of fiscal law. The Bona Fide Needs Rule derives from a statute that states: "[t]he balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability."⁵⁵ This means that, for example, the Army may use FY 1995 funds only for the bona fide (good faith) needs of FY 1995, and not for those of an earlier or later year.

The Bona Fide Needs Rule is related to the Antideficiency Act. Congress intended that both would help provide discipline to government agencies and to stay within the fiscal limitations that Congress imposes upon them.⁵⁶ Under some circumstances, a violation of the Bona Fide Needs Rule can trigger a violation of the Antideficiency Act.

In *Veterans Administration: Recording and Liquidating Obligations for Benefits*,⁵⁷ the Comptroller reviewed the practices of the Veterans Administration (VA) regarding compensation and pension benefit claims. The VA approved these claims late in FY 1986, but then paid them early in FY 1987 with FY 1987 funds,⁵⁸ because it had exhausted its FY 1986 appropriation.⁵⁹ The Comptroller noted that the obligations arose as of the date of approval, in FY 1986, and therefore the VA should have recorded them as FY 1986 obligations, "regardless of the amount of available budgetary resources."⁶⁰ The Comptroller cited 31 U.S.C. § 1502(a), the Bona Fide Needs Rule, in support of his finding that FY 1987 funds were not available to liquidate FY 1986 obligations.⁶¹ The Comptroller then concluded that "since none of VA's [FY] 1987 appropriation was available for [FY] 1986 obligations, the Antideficiency Act precluded the use of the [FY 1987] appropriation to liquidate fiscal year 1986 obligations."⁶²

Veterans Administration shows that a violation of the Bona Fide Needs Rule can result in an Antideficiency Act violation. Although the decision never uses the phrase "Bona Fide Needs Rule," it is clear from the reasoning, and the cite to 31 U.S.C. § 1502(a), that the Comptroller used the Rule as the basis for his Antideficiency Act conclusion. Although the decision fails to discuss the possibility of correcting the violation, the Comptroller knew that the account with proper funds was exhausted.⁶³ Correction was not an option.

In *Farmers Home Administration Purchase of Office Chairs (FmHA)*⁶⁴ the Comptroller reached a different conclusion. However, because of its unclear and anomalous reasoning, this decision has concerned some in the government contract law community.

In late FY 1990, Farmers Home Administration (FmHA) ordered office chairs and charged FY 1990 funds, but delays pushed the issue of the delivery orders into FY 1991 and delivery of the chairs into FY 1992.⁶⁵ FmHA changed the funding code to FY 1991 funds and corrected the accounts for the funds already expended.⁶⁶ Even though FY 1990 funds were unavailable to pay for the needs of FY 1991 or 1992, the Comptroller found no violation of the Antideficiency Act.⁶⁷

The facts raise troublesome issues. FmHA apparently tried to pay for a new obligation with expired funds that were not available for that obligation, which seems uncorrectable. Furthermore, FmHA apparently violated the Antideficiency Act by contracting before an appropriation, but the Comptroller found no violation. The decision fails to address these issues satisfactorily.

One general principle in *FmHA* stands clear. There was no Antideficiency Act violation, because "[a]s corrected, FmHA

⁵⁵ 31 U.S.C. § 1502(a) (West 1983).

⁵⁶ The Honorable Andy Ireland, House of Representatives, B-245856.7; 71 Comp. Gen. 502, 502 (1992).

⁵⁷ B-226801, 1988 U.S. Comp. Gen. LEXIS 212 (Mar. 2, 1988).

⁵⁸ *Id.* at *1-2.

⁵⁹ *Id.* at *4-5.

⁶⁰ *Id.* at *9.

⁶¹ *Id.* at *11-12.

⁶² *Id.* at *15.

⁶³ *Id.* at *4-5.

⁶⁴ B-251706, 1994 U.S. Comp. Gen. LEXIS 672 (Aug. 17, 1994).

⁶⁵ *Id.* at *2-3.

⁶⁶ *Id.* at *3.

⁶⁷ *Id.* at *1.

has not made or authorized an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."⁶⁸ The use of FY 1990 funds to fund a purchase order issued in FY 1991 was not an Antideficiency Act violation, *because the agency corrected the accounts*. This decision indicates that the Comptroller is willing to find that correction can neutralize apparent Antideficiency Act violations based on violations of the Bona Fide Needs Rule.

Indemnification Agreements

Use of an indeterminate indemnification (or "hold-harmless") agreement is one type of Antideficiency Act violation that an agency apparently cannot avoid by correction. Indemnification agreements sometimes appear in contracts and quasi contractual instruments. Typically, they provide that the government agrees to indemnify, or compensate, the contractor for liabilities incurred in performance of the contract. The law in this area has evolved over the years.

*United States Park Police Indemnification Agreement*⁶⁹ is a good example of current law. In that decision, the Comptroller reviewed the use of indemnification clauses providing that the United States Park Police would "indemnify and save harmless the other parties for property damage or personal injury which may arise out of the activities of the other parties."⁷⁰ The Comptroller stated that indemnity provisions subject the United States to "potentially-unlimited contingent liability,"⁷¹ and violate the Antideficiency Act, "since it can never be said that sufficient funds have been appropriated to cover the contingency."⁷²

Previously, the Comptroller stated that indemnification agreements could be acceptable if the maximum amount of liability is fixed and the agency keeps that amount available.⁷³

This makes sense because there would be no deficiency. However, the Comptroller recently stated, without explanation, that this no longer represents his position; agencies may use indemnification agreements only if Congress gives its express approval.⁷⁴ Although a few statutory exceptions exist,⁷⁵ the general rule is that use of indeterminate indemnification agreements are violations of the Antideficiency Act.⁷⁶ (The *potential* for a funding shortfall is critical).

Federal Acquisition Regulation (FAR) clause 52.228-7, Insurance—Liability to Third Persons, takes a contrary view. That clause provides that the government will indemnify the contractor for certain liabilities to third persons, but the amount of government liability is subject to the availability of appropriated funds at the time the contingency occurs. At first glance, the limitation in that clause would appear to prevent an Antideficiency Act violation. However, the Comptroller rejected that idea in *United States Park Police Indemnification Agreement*.⁷⁷ In that decision, the Comptroller stated that limiting liability to available funds is not prudent, because payment of a large obligation could devastate the agency's accounts and force the agency to ask Congress for more money anyway.⁷⁸ Additionally, this clause appears only in cost-reimbursement contracts that are not for construction or architect-engineer services. *Federal Acquisition Regulation* clause 52.228-7 is not a perfect solution to the indemnification agreement problem.

Miscellaneous Exceptions

The Antideficiency Act applies only to Executive Branch management of appropriations. Judicial awards, even if they exceed available appropriations, do not violate the Antideficiency Act.⁷⁹ There is no violation even if the judgment requires the agency to request a supplemental appropriation from Congress.⁸⁰

⁶⁸ *Id.* at *5 (emphasis added).

⁶⁹ B-242146, 1991 U.S. Comp. Gen. LEXIS 1070 (Aug. 16, 1991).

⁷⁰ *Id.* at *3.

⁷¹ *Id.* at *4.

⁷² *Id.*

⁷³ Assumption by Government of Contractor Liability to Third Persons—Reconsideration, B-201072, 62 Comp. Gen. 361, 365 (1983).

⁷⁴ *United States Park Police Indemnification Agreement*, B-242146, 1991 U.S. Comp. Gen. LEXIS 1070, at *6 (Aug. 16, 1991).

⁷⁵ See, e.g., 10 U.S.C. § 2354 (West 1983) (indemnification provisions authorized for research and development contracts for unusually-hazardous risks); 50 U.S.C. § 1431 (West Supp. 1994) (President may exempt some defense-related agreements from other provisions of law to facilitate the national defense).

⁷⁶ *United States Park Police Indemnification Agreement*, B-242146, 1991 U.S. Comp. Gen. LEXIS 1070 (Aug. 16, 1991).

⁷⁷ B-242146, 1991 U.S. Comp. Gen. LEXIS 1070 (Aug. 16, 1991).

⁷⁸ *Id.* at *5.

⁷⁹ Availability of Funds for Payment of Intervenor Attorney Fees—Nuclear Regulatory Commission, B-208637, 62 Comp. Gen. 692, 700 (1983).

⁸⁰ Bureau of Land Management—Reimbursement of Contract Disputes Act Payments, B-211229, 63 Comp. Gen. 308, 312 (1984).

The Antideficiency Act does not apply whenever Congress says it does not apply, directly or indirectly, through legislation. "[T]he Antideficiency Act... [is] directed at discretionary obligations entered into by administrative officers and... the Act specifically provides an exception for mandatory obligations which are authorized by law to be made in excess of or in advance of appropriations."⁸¹ A prime example is the statute that permits the DOD to acquire "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies" regardless of whether there are adequate appropriations.⁸² Another example—from a Comptroller General decision—was the Guaranteed Student Loan Program; the statutory scheme provided for mandatory payments, and allowed the Department of Education to borrow from the Treasury if the Student Loan Discount Fund was not sufficient.⁸³

These two examples demonstrate that exceeding an appropriation is not a violation if Congress authorizes it. The Antideficiency Act was not designed to prevent exceeding amounts available in every situation. It was designed to stop the agencies' former practice of going to Congress with "coercive deficiencies,"⁸⁴ or in other words, forcing Congress to choose between providing additional funding or allowing the activity to shut down.

Summary

The Army can correct many types of fiscal violations to avoid Antideficiency Act violations. Determinations of correctability are fact specific and depend largely on availability of proper funding, but it is possible to identify two general categories of violations:

Correctable Violations

- (1) Purpose violations that involve use of an incorrect appropriation for an authorized expenditure or obligation.
- (2) Violations of statutory ceilings, when the ceilings are not absolute limits for the object, but only limitations on the use of a particular appropriation.
- (3) Violations of the Bona Fide Needs Rule.

Violations That Are Not Correctable

- (1) Violations of the Purpose Statute that involve expenditure or obligation for an object that is unauthorized.

- (2) Violations of the Purpose Statute that involve an expenditure or obligation that Congress has prohibited.
- (3) Violations of statutory ceilings, when the ceilings are absolute limits for the object at issue.
- (4) Use of indeterminate indemnification agreements.

The Army's Regulation

For internal guidance, the Army attempts to define what constitutes an Antideficiency Act violation in AR 37-1:

Formal distributions are made as allocations, suballocations, allotments, and specific limitations on funding authorization documents (FADs). *Antideficiency Act violations occur when formal subdivisions of funds or other specific statutory limitations (minor construction limits, investment/expense thresholds, and so forth) are breached.* The U.S. Army will investigate and report statutory violations to the President of the United States, U.S. Congress, OMB, and OSD.⁸⁵

This subparagraph is an apparent attempt to summarize the law, but it is deceptive. Someone unfamiliar with the intricacies of correctability could read this to believe that every "breach" of a statutory limitation is an Antideficiency Act violation. The subparagraph mentions minor construction limits and investment/expense thresholds—two types of violations clearly correctable if the Army has the correct funding available. Unfortunately, this guidance can lead to unnecessary reporting of "violations" to the highest levels.

Army Regulation 37-1 attempts to address the issue of correctability as follows:

Using funds for purposes other than those for which they were appropriated is a violation of 31 USC 1301(a). This is not an antideficiency violation, but could result in one if the required corrections cause an over-obligation or an over-expenditure in the proper account. A misapplication of funds will not cause an antideficiency violation if

⁸¹ Veterans Administration: Recording and Liquidating Obligations for Benefits, B-226801, 1988 U.S. Comp. Gen. LEXIS 212 (Mar. 2, 1988) (VA would not have violated Antideficiency Act by recording entitlement claims as obligations against current appropriation even though it was exhausted).

⁸² 41 U.S.C. § 11 (West 1987) (no contracts or purchases unless authorized or under adequate appropriation; report to Congress).

⁸³ Department of Education: Recording of Obligations under the Guaranteed Student Loan Program, B-219161, 65 Comp. Gen. 4, 9-10 (1985).

⁸⁴ Hopkins & Nutt, *supra* note 7, at 58.

⁸⁵ AR 37-1, *supra* note 6, para. 7-6b.

a. Proper funds were available when the misapplication occurred.

b. Proper funds were continuously available after the misapplication occurred (However, as a practical matter, this can usually be verified only at month-end).

c. Proper funds were available when the misapplication was discovered and the appropriate corrections were made.⁸⁶

This section is poorly drafted, for a number of reasons. It states that a violation of the Purpose Statute is not an Antideficiency Act violation unless correction over obligates or over expends the correct account. It does not mention the Comptroller's interpretation that failure to correct with proper funds, by itself, violates the Antideficiency Act. It fails to mention that an expenditure or obligation of any appropriation for an object or purpose that is unauthorized or expressly prohibited by Congress, is not correctable, because there are no proper (or "available") funds anywhere. The section states that "misapplication" will not cause an Antideficiency Act violation if the responsible party meets a three-part test. However, the second part of the test is unnecessary, and even harmful.

The Comptroller General does not require that proper funds be "continuously available after the misapplication occurred" as does subparagraph b of AR 37-1. As discussed above, the Comptroller General only requires that proper funds be available at the time of erroneous obligation, and again at the time of correction.

Army Regulation 37-1's "continuously available" requirement is unnecessary and unfair to the Army personnel that are responsible for appropriated funds. If a situation arises where someone could not meet AR 37-1's continuously available requirement (and only the continuously available requirement) of the test, the regulation requires reporting of an Antideficiency Act violation, even though the Comptroller would not recognize any violation.

Army Regulation 37-1 is unduly restrictive. The Comptroller investigates, decides, and reports to Congress on all matters relating to appropriated funds, and is a primary source of fiscal law.⁸⁷ The Army should conform AR 37-1 to the Comptroller's view to prevent unnecessary reporting.

Recommended Revisions

Revised paragraph 7-6.b would read as follows:

⁸⁶ *Id.* para. 7-9.

⁸⁷ 31 U.S.C. § 712 (West 1983) (investigating the use of public money); PRINCIPLES, *supra* note 4.

Formal distributions are made as allocations, suballocations, allotments, and specific limitations on funding authorization documents (FADs). *Antideficiency Act violations occur when formal subdivisions are exceeded, and will occur in the following situations:*

(1) *Expenditures or obligations for an object or purpose for which payment with available appropriated funds is not authorized.*

(2) *Expenditures or obligations for an object or purpose that is prohibited by appropriations act or other statute.*

(3) *Expenditures or obligations that exceed a statutory ceiling, when the ceiling is an absolute limit for the object or purpose.*

(4) *Use of indeterminate indemnification agreements without authorization from Congress.*

New paragraph 7-6.c would read as follows:

The U.S. Army will investigate and report violations of the Antideficiency Act in accordance with paragraph 7-7.

Revised paragraph 7-9 would read as follows:

a. *Use of funds for an object or purpose other than that for which the funds were appropriated will not be an Antideficiency Act violation if the responsible official can and does correct the violation upon discovery. The following types of violations may be correctable:*

(1) *Use of an incorrect appropriation for an authorized expenditure or obligation.*

(2) *Violations of a statutory ceiling, when the ceiling is not an absolute limit for the object, but only a limitation on the use of a particular appropriation.*

(3) *Violations of the Bona Fide Needs Rule.*

b. *Correction means reimbursement of the improperly-charged account with funds from the proper account upon discovery of the violation. Correction will avoid an Anti-deficiency Act violation if—*

(1) *Proper funds were available when the erroneous expenditure or obligation occurred; and,*

(2) *Proper funds were available when the erroneous expenditure or obligation was discovered and corrected.*

Conclusion

The Army must revise its regulation to be in accordance with the decisions of the Comptroller General. *Army Regula-*

tion 37-1 requires 15-6⁸⁸ investigations for all potential Antid-efficiency Act violations.⁸⁹ Although necessary for *real* violations, the regulation defines "violations" too broadly. It is unlikely that Congress intended to require the Army to report every correctable violation to Congress and the President. Undoubtedly, Congress intended the reporting requirement to only cover violations that offend the congressional intent of the Appropriations and Authorization Acts.

With the current initiative toward acquisition streamlining, the Army should revise its regulations that waste time, effort, and resources. Additionally, the Army should not subject its personnel to unnecessary investigations into nonexistent crimes. The Army needs to correct its views on correctability.

⁸⁸ DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988).

⁸⁹ AR 37-1, *supra* note 6, para. 7-7.

Usalsa Report

United States Army Legal Services Agency

Clerk of Court Notes

Court-Martial Processing Times

Average processing times for general courts-martial and bad-conduct discharge special courts-martial whose records of trial were received by the Army Judiciary during the second quarter of Fiscal Year (FY) 1995 are shown below. For comparison, the previous quarter and FY 1994 processing times also are shown.

General Courts-Martial

	FY 1994	1Q, FY 95	2Q, FY95
Records received by Clerk of Court	789	187	208
Days fr chgs or restnt to sentence	53	55	56
Days from sentence to action	70	83	80
Days from action to dispatch	8	10	10
Days enroute to Clerk of Court	9	9	8

BCD Special Courts-Martial

	FY 1994	1Q, FY 95	2Q, FY95
Records received by Clerk of Court	150	53	36
Days fr chgs or restnt to sentence	37	34	33
Days from sentence to action	58	60	71
Days from action to dispatch	7	4	6
Days enroute to Clerk of Court	9	9	8

Litigation Division Notes

Liability of the United States for Accidents Involving Vehicles Rented Under the United States Government Car Rental Agreement¹

The United States Government Car Rental Agreement (Agreement) provides advantages to the Army and other federal agencies normally unavailable in the private sector. However, the United States often fails to obtain the full benefits of the Agreement because Army claims personnel are unaware of the Agreement's benefits and requirements. By understanding the Agreement, and taking the necessary actions to protect the Army's interests, judge advocates can greatly reduce the financial exposure of the United States, the Army, and Army employees for the operation of rental vehicles.

Although the Army's Military Traffic Management Command negotiated the Agreement, it applies to, and is used by, all federal agencies. All major United States car rental companies and many smaller rental firms are signatories to the Agreement.

Under the Federal Tort Claims Act (FTCA), the United States is liable for the negligent acts of federal employees that occur in the scope of their employment.² The United States frequently will be held liable for vehicle accidents that occur while federal employees are driving rental vehicles.³ However, the Agreement mandates that signatories must provide

insurance coverage to the government and its employees with minimum limits of \$100,000 for each individual in an accident, \$300,000 for all individuals in an accident, and \$25,000 for property damage.⁴ This insurance provision has saved the Army over \$500,000 in the past year.

When a vehicle rented outside the scope of the Agreement (for example, an unauthorized type vehicle or a nonparticipating company or location) is involved in an accident caused by a government employee acting in the scope of duty, the authority that issued the fund cite for the travel orders would be required to pay for the damage to the rental automobile.⁵ An unexpected expenditure for damage to a rental automobile, which easily could be \$10,000 to \$20,000, may seriously affect an organization's ability to conduct mission travel. The Agreement eliminates this risk by providing that a participating rental company and location assumes all risk of damage to the vehicle subject to enumerated exceptions.⁶

To protect United States interests, the claims office that learns of an accident involving a rental vehicle must open a potential claim file.⁷ The potential claim file should include the standard claims investigative materials and copies of the employee's travel orders and the vehicle rental agreement.⁸ Because rental car companies frequently contest insurance coverage under the circumstances of the accident, the claims office also should coordinate with the rental company and attempt to obtain a written acknowledgement of insurance coverage.⁹ Contact should be maintained with the rental car

¹ While the primary scope of this note relates to the United States Government Car Rental Agreement, the same procedures should be followed in all cases involving rental vehicles.

² 28 U.S.C. §§ 1346(b), 2671-2680 (1982).

³ See, e.g., *Wilkinson v. United States*, 677 F.2d 998 (4th Cir. 1982).

⁴ Paragraph 9a. of the Agreement provides:

Notwithstanding the provisions of any Company rental vehicle agreement executed by the Government employee, the Company will maintain in force, at its sole cost, insurance coverage, or a duly qualified self insurance program, which will protect the United States Government and its employees against liability for personal injury, death, and property damage arising from the use of the vehicles. The personal injury/wrongful death limits will be at least \$100,000 for each person for each accident or event, \$300,000 for all persons in each such accident or event, and property damage limits of \$25,000 for each such occurrence. The conditions, restrictions and exclusions of the applicable insurance for any rental shall not be less favorable to the Government and its employees than the coverage afforded under standard automobile liability policies.

⁵ 1 JOINT FED. TRAVEL REGS. ¶ U3415(C)(2)(a)(1994) [hereinafter 1 JFTR]; 2 JOINT TRAVEL REGS. ¶ C2102(4)(a) (1994) [hereinafter 2 JTR]; DEP'T OF ARMY, REG. 55-355, TRANSPORTATION AND TRAVEL: DEFENSE TRAFFIC MANAGEMENT REGULATION, para. 58-5 (31 July 1986) [hereinafter AR 55-355]. These provisions use the term "deductible" and do not expressly take into account that rental car companies now hold travelers responsible for all damage to a vehicle. Furthermore, the purchase of loss damage waiver or similar coverage for travel in the United States is not a reimbursable expense for a government traveler.

⁶ Pursuant to paragraph 9 of the Agreement, the exceptions include:

- Willful and wanton misconduct on the part of the driver;
- Obtaining the vehicle through fraud or misrepresentation;
- Operation of the vehicle by a driver who is under the influence of alcohol or any prohibited drugs; and
- Operation by a person other than an authorized driver.

⁷ DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 2-3 (28 Feb. 1990) [hereinafter AR 27-20]. Additionally, the claims office should automatically notify the United States Army Claims Service. *Id.* para. 2-11b(3).

⁸ The claims office also should verify that the traveler has provided timely notice of the accident to the rental company or its insurer.

⁹ Even when the vehicle is rented outside the Agreement, the rental car company may offer basic liability coverage for the benefit of the United States and its employees.

company or its insurer to monitor the status of its claim.¹⁰ In the event that the employee is personally sued, the claims office should immediately notify the rental car company and Litigation Division. Failure to notify the rental car company or its insurer of a lawsuit may result in a denial of coverage under applicable local law.

While most claims involving rental automobiles are resolved through the administrative claims process, lawsuits alleging negligence by federal employees while acting in the scope of their employment still must comply with the provisions of the FTCA.¹¹ Accordingly, a plaintiff must file an administrative claim before filing suit.¹² Moreover, the employee is personally immune from suit for these actions.¹³ In coordination with the appropriate United States Attorney, the Litigation Division will take the necessary action to preserve the interests of the Army and the employee, including removal from state court and substitution of the United States as the sole party-defendant.¹⁴ Litigation Division involvement will permit early resolution of any disputes concerning insurance coverage.

While the Agreement provides significant advantages to the United States and its employees, several potential problem areas remain. First, the franchise structure of the industry allows some locations of a signatory company to opt out of the Agreement.¹⁵ Second, a signatory company may not apply the agreement to all types of vehicles.¹⁶ Arguably, the contractor holding the regional travel contract is responsible for verifying that both the location and the vehicle fall under

the terms and conditions of the Agreement.¹⁷ In practice, however, the travel agencies occasionally fail to verify participation. It also may be difficult for an individual traveler to determine whether a particular location of a rental company will stand by the terms and conditions of the Agreement.¹⁸ Accordingly, government personnel performing official travel always should ask about participation prior to renting a vehicle. If the location indicates that they are not participating, the traveler should use a different company. Travelers also should be advised to specifically indicate on the rental agreement that the rental is pursuant to the United States Government Car Rental Agreement. Third, some organizations contract for rental vehicles rather than using the Agreement. The short-term savings from this contracting is outweighed by the broader reduction in vehicle damage claims and liability exposure. Finally, NATO employees conducting official business in the United States are employees of the United States for the purposes of the FTCA.¹⁹ The failure of the Agreement to expressly include such individuals as covered employees has resulted in litigation concerning coverage.

Questions frequently arise on the incidental use of rental vehicles while the employee is in a travel status. Under federal travel regulations, the use of a rental vehicle is limited to official purposes, to include transportation between places where the employee's presence is required for official business, or between such places and temporary lodging. Under some circumstances, a rental vehicle also may be used for travel "to places necessary to obtain suitable meals, drug-stores, barber shops, places of worship, cleaning establish-

¹⁰ In the event of an inquiry, a claimant should be advised to submit a Standard Form 95, Claim for Damage, Injury, or Death, within the two-year statute of limitations and also to attempt to resolve the claim directly with the rental car company or its insurer.

¹¹ In some jurisdictions, plaintiffs may sue the rental car company directly under "ownership" or similar statutes. Litigation Division should also be notified of these cases because the rental car company may later attempt to sue the United States or its employees for indemnification.

¹² 28 U.S.C. § 2675 (1994).

¹³ *Id.* § 2679(b)(1).

¹⁴ Requiring plaintiffs to comply with FTCA provisions also reduces the cost of providing insurance coverage and encourages rental car companies to participate in the Agreement. For example, a plaintiff in an FTCA action is not entitled to a jury (U.S.C. § 2402), nor prejudgment interest (28 U.S.C. § 2674). Additionally, attorney's fees are limited (28 U.S.C. § 2678).

¹⁵ An employee may elect to use nonparticipating rental car companies that offer lower rates and meet service requirements. AR 55-355, *supra* note 5, para. 58-4(a)(3). In light of the Agreement's benefit to the United States, this use would be unwise under most circumstances.

¹⁶ The vehicle problem seems acute with vans because some companies do not include van rental in the Agreement. Still, paragraph 2 of the Agreement indicates that if the rental company provides a vehicle not listed in the agreement, "the terms and conditions of this Agreement will nevertheless apply." Nonetheless, rental companies routinely assert claims for damage to vehicles not listed in their Attachments to the Agreement. In one case, an employee rented a convertible and paid the additional cost personally. Unfortunately, the employee had an accident in the convertible and his organization is faced with a \$20,000 claim for damages from the rental company. Likewise, the companies also might deny insurance coverage for claims resulting from the use of these vehicles.

¹⁷ Whether any recovery against the travel agency contractor for failure to select a participating vehicle or location would be limited to the Contract Disputes Act, 41 U.S.C. §§ 601-613a (1994), or could proceed under a negligence theory, is unclear.

¹⁸ Because paragraph 2 of the Agreement requires that rates must be quoted in whole dollar amounts, any rate not quoted in whole dollar amounts is a clear indication that the location or vehicle is not a participant in the Agreement. Paragraph 6 of the Agreement requires that participating company telephone reservation centers must verify participating locations.

¹⁹ 10 U.S.C. § 2734(b) (1994).

ments, and similar places required for the sustenance, comfort or health of the [employee] which fosters the continued efficient performance of Government business."²⁰ In addition to potential disciplinary action against the employee, the insurance provisions of the Agreement may not apply if an employee's spouse is operating the vehicle at the time of an accident or if the employee is using the vehicle for personal purposes.²¹ Furthermore, improper use of a rental vehicle could result in personal liability for the employee, as the United States is only liable under the FTCA for actions of employees occurring within the scope of their employment.²² Captain Kee.

A Tremor in the Jurisdictional Foundation: *Quality Tooling, Inc. v. United States*

A long-standing jurisdictional principle is that a waiver of sovereign immunity, or consent to be sued, "cannot be implied and must be unequivocally expressed."²³ Equally recognized is the principle that, among other things, the Tucker Act grants jurisdiction to, and waives sovereign immunity in, the Court of Federal Claims.²⁴ Recently, a panel of the Court of Appeals for the Federal Circuit (CAFC) departed from these long-standing principles in a case which interprets whether bankruptcy courts have jurisdiction over government contract disputes. Specifically, by a two-to-one vote, the panel concluded, among other things, that a district court, sitting in bankruptcy, shares concurrent jurisdiction with the United States Court of Federal Claims to entertain Contract Disputes Act (CDA) disputes.²⁵

This case arises from the termination for default of a contract between Quality Tooling (Quality) and the United States Army Missile Command. Quality filed its complaint in the

United States Court of Federal Claims²⁶ on October 10, 1991, requesting that its termination for default be converted to a termination for convenience. The case then followed a tortured procedural history.

On January 10, 1992, the government requested that Quality's complaint be dismissed on the grounds that the Court of Federal Claims could not entertain a complaint seeking non-monetary relief. Quality then requested leave to amend its complaint and to allege a monetary claim that had accrued after institution of its complaint. The government argued that an amendment was inappropriate because the facts Quality requested leave to allege did not cure the jurisdictional defects at the time its action was filed and that, in any event, the newly asserted monetary "claim" was never subject to a contracting officer's final decision.

On February 6, 1992, Quality sought bankruptcy protection in the United States Bankruptcy Court for the Northern District of Alabama. On April 6, 1992, Quality filed a "notice of removal" with the United States District Court for the District of Columbia (to transfer the action from the Court of Federal Claims) and filed a motion to transfer the action from the District of Columbia to the United States District Court for the Northern District of Alabama. The United States District Court for the District of Columbia granted Quality's motion to transfer.

On July 17, 1992, the United States District Court for the Northern District of Alabama denied Quality's request to refer the case to the bankruptcy court and ordered the government to file an answer to the complaint.²⁷ On September 15, 1992, the United States District Court for the Northern District of Alabama granted Quality Tooling's motion to amend the complaint to include those allegations regarding the postcomplaint "claim."²⁸

²⁰ 1 JFTR, *supra* note 5, ¶ U3415(G) (1994); 2 JTR, *supra* note 5, ¶ C2102(6) (1994). In addition, paragraph 8 of the Agreement states that only federal employees "while acting within the scope of their employment duties" are authorized to operate vehicles rented under the Agreement.

²¹ Arguably, insurance coverage still may apply under these circumstances because the Agreement requires the signatory to maintain insurance coverage for the United States and its employees. See *supra* note 4. Pursuant to paragraph 9a. of the Agreement, the restrictions and exclusions of coverage shall not be less favorable than the coverage afforded under standard automobile liability policies. *Chufo v. Department of Interior*, 45 F.3d 419 (Fed. Cir. 1995), provides an illustrative example of improper personal use of a vehicle rented at government expense.

²² 28 U.S.C. §§ 1346(b), 2679(b)(1) (1994).

²³ *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

²⁴ *United States v. Mitchell*, 463 U.S. 206, 212 (1982).

²⁵ *Quality Tooling, Inc. v. United States*, 93-1234 (Fed. Cir. Jan. 31, 1995).

²⁶ In 1992, Congress passed the Federal Courts Administration Act, which, among other things, changed the name of the United States Claim Court to the United States Court of Federal Claims. Federal Courts Administration Act of 1992, Title IX, Pub. L. No. 102-572, 106 Stat. 4506 (1992). For simplicity, this article will refer to this court only as the Court of Federal Claims.

²⁷ The government's motion to dismiss, filed January 10, 1992, was still pending. On October 14, 1992, the district court denied the motion to dismiss on the grounds that it possessed jurisdiction pursuant to 28 U.S.C. § 1334(b). *Quality Tooling, Inc. v. United States*, No. 92-AR-1189-S (N.D. Ala. Oct. 14, 1992).

²⁸ *Quality Tooling, Inc. v. United States*, No. 92-AR-1189-S (N.D. Ala. Sept. 15, 1992).

On October 2, 1992, the government filed a motion for transfer to the Court of Federal Claims pursuant to 28 U.S.C. § 1292(d)(4), arguing that only the Court of Federal Claims possessed jurisdiction over Quality's CDA monetary claims. On December 14, 1992, the United States District Court for the Northern District of Alabama denied the government motion for transfer, holding that "the United States has not satisfied this court that the new Court of Federal Claims can maintain jurisdiction over claims involving a bankruptcy estate such as that of Quality Tooling."²⁹ The government appealed this decision.

By a two-to-one decision, the panel of the CAFC held that the district court possessed jurisdiction in the first instance to entertain CDA-based claims on the grounds that 28 U.S.C. § 1334(b)³⁰ provided the district court with subject matter jurisdiction and that the Tucker Act, 28 U.S.C. § 1491, provided the requisite government consent to suit in that forum.

The panel's opinion is incorrect in two respects. First, the panel concludes that the Tucker Act "waives the government's immunity from suit on its contracts in any court to which Congress grants jurisdiction to hear the claim."³¹ This holding is contrary to well-established rules of statutory interpretation. Case law is replete with admonitions against broadly interpreting waivers of sovereign immunity.³² Despite these clear and long-standing warnings, the panel relied on an "ordinary canon of statutory construction" and created an *implied* waiver of sovereign immunity.

Second, to reach its conclusion, the panel ignored the language of the Tucker Act, which limits its waiver of sovereign immunity to the Court of Federal Claims. The Act states: (a) (1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States ... (2) arising under section 10(a)(1) of the Contract Disputes Act of 1978 ...³³

In disregarding the Tucker Act's terms, the panel concluded that Congress implicitly waived sovereign immunity over Quality's claims in the bankruptcy court after

put[ting] *in para materia* the relevant provisions of the Bankruptcy Act, expressly granting jurisdiction to district courts over matters otherwise exclusively in other courts, with the language of the Tucker Act and the CDA, waiving in unmistakable terms any claim to sovereign immunity for these contract claims.³⁴

The panel's reasoning is fundamentally incorrect. By relying on a rule of statutory interpretation to reach the waiver of sovereign immunity, the panel ignored the requirements that such waivers be explicit and strictly construed.³⁵

²⁹Quality Tooling, Inc. v. United States, No. 92-AR-1189-S (N.D. Ala. Dec. 14, 1992).

³⁰Section 1334(b) provides, in pertinent part, that

[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(b).

³¹Quality Tooling, Inc., 93-1234, at 13 (Fed. Cir. Jan. 31, 1995) (emphasis added). The panel also stated that "[t]he issue here is not whether the Government has waived its sovereign immunity, but whether the waiver extends to federal trial fora other than the Court of Federal Claims." *Id.* at 15.

³²See, e.g., United States v. Mottaz, 476 U.S. 834, 841 (1986) (When the government consents to be sued, "the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction."); United States v. Sherwood, 312 U.S. 584, 590 (1941) (any waiver of sovereign immunity must be strictly construed); United States v. Nordic Village, Inc., 503 U.S. 30, (1992) (waivers of sovereign immunity "are not generally to be 'liberally construed'").

³³28 U.S.C. § 1491. The Tucker Act serves as a waiver of sovereign immunity in the Court of Federal Claims. United States v. Mitchell, 463 U.S. 206, 212 (1982). Waivers of sovereign immunity are only effective in those courts designated in the waiver. United States v. Shaw, 309 U.S. 495, 500-01 (1940) ("when suits are authorized they must be brought only in [the] designated courts"). Additionally, the Tucker Act has been interpreted to grant exclusive jurisdiction to the Court of Federal Claims. Hahn v. United States, 757 F.2d 581, 586 (3d Cir. 1985) ("for claims exceeding \$10,000, the Tucker Act vests *exclusive* jurisdiction in the [Court of Federal Claims] . . . even if such claims could be brought within the terms of some other jurisdictional grant, such as 28 U.S.C. § 1331."). Arguably, therefore, the panel also erroneously determined that 28 U.S.C. § 1334(b) provided the district court with subject matter jurisdiction.

³⁴Quality Tooling, Inc., 93-1234 (Fed. Cir. Jan. 31, 1995), Majority Opinion at 13.

³⁵Furthermore, in the context of CDA litigation before a bankruptcy court, the panel's opinion renders superfluous the explicit waivers of sovereign immunity contained in 11 U.S.C. §§ 106(b) and 106(c), in the bankruptcy court. Sections 106(b) and 106(c) waive sovereign immunity for compulsory and permissive counterclaims against government claims. In contrast, to trigger the Tucker Act's waiver, no initial claim by the government is necessary, nor is a plaintiff's potential recovery restricted in any way by the magnitude of a government counterclaim, if any. Thus, following the panel's reasoning, in CDA litigation before a bankruptcy court, as long as a bankrupt plaintiff possesses a cognizable Tucker Act claim, the specific, explicit, and limited waivers of sovereign immunity contained in section 106 are superfluous.

The opinion, if unchanged, will have far-reaching effects on the resolution of government contract disputes. At this time, the full extent of these impacts is unknown, but the impacts are certain to be substantial. The majority's decision could vastly expand the district court's³⁶ authority to entertain claims that formerly were in the exclusive jurisdiction of the Court of Federal Claims, including, as here, claims explicitly excluded from the district court's jurisdiction (*i.e.*, CDA-based suits).³⁷ For that matter, nothing in the majority's opinion necessarily precludes a district court from asserting concurrent jurisdiction with the Court of Federal Claims when its jurisdiction is founded on, for example, a federal question pursuant to 28 U.S.C. § 1331.

Another possible consequence of this jurisdictional change is that bankrupt plaintiffs, in a search for more favorable forums, may file their CDA-based complaints in federal district court instead of the Court of Federal Claims or the boards of contract appeals. Some companies with potential CDA-claims may even be induced to file for protection under the Bankruptcy Code, who otherwise would not, believing the local district court will be a more favorable forum to assert the CDA claim.³⁸

In recognition of the potentially drastic jurisdictional effects that this decision may have, on March 17, 1995, the government filed a petition for rehearing and request for a rehearing en banc. The CAFC ordered Quality to provide its response to the Government's petition by April 20, 1995. As of 13 June, 1995, no further information is available. Major Wheaton.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin (Bulletin)*, designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automation Army-Wide Systems Bulletin Board Service, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issue (volume 2, number 8) is reproduced below:

³⁶Expanding the district courts' authority is equivalent to expanding the bankruptcy courts' authority. United States district courts have jurisdiction of all cases under Title 11 of the Bankruptcy Act. 28 U.S.C. § 1334(a); *see, e.g.*, *In re Kaiser*, 722 F.2d 1574, 1577 (2d Cir. 1983); *In re Adams*, 761 F.2d 1422, 1424-25 (9th Cir. 1985). District courts may provide that any or all cases or proceedings arising under Title 11 of the Bankruptcy Act shall be referred to the bankruptcy judges of the district. 28 U.S.C. § 157(a).

³⁷*See* 28 U.S.C. § 1346(a)(2).

³⁸The panel's opinion was unconcerned with this potential wholesale forum shopping. The panel, however, placed no restraints to ensure that its reasoning did not result in either a "wholesale transfer of suits" from, nor bypassing of, the Court of Federal Claims.

³⁹*KFC Western, Inc. v. Meghriq*, 49 F.3d 518 (9th Cir. 1995).

Cost Recovery Actions Under Resource Conservation and Recovery Act § 7002 (a)(1)(B)

On 1 March 1995, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) ruled that a private plaintiff may bring a RCRA imminent hazard citizens' suit pursuant to § 7002 (a)(1)(B) for the recovery of costs already expended for remediation.³⁹ The Ninth Circuit relied strongly on a 1989 decision by the United States Court of Appeals for the Eighth Circuit, which held that the Environmental Protection Agency (EPA) Administrator may sue for equitable restitution of costs pursuant to § 7003, citing the similarity in language of the two sections. The opinion states that the language of the RCRA does not require that the action be brought while the endangerment exists, so long as the endangerment existed at the time of the remediation. Additionally, the Ninth Circuit held that the language of § 7002(a) that authorizes the district court to "order such person to take such other action as may be necessary" specifically authorizes restitution. Furthermore, the Ninth Circuit rejected Meghriq's contention that the RCRA's lack of a statute of limitations is evidence of the unavailability of cost recovery actions. Instead, the Ninth Circuit held that fairness in reimbursement actions can be maintained by applying equitable defenses such as laches. The Ninth Circuit specifically noted that KFC Western had no other federal statutory remedy available, and that KFC Western was a wholly innocent party with respect to generating or releasing the contamination. *Ms. Fedel*.

Title V Operating Permit Program: Implementation at Fort Dix

Section 502 of the 1990 Clean Air Act (CAA) Amendments, known as the Title V Operating Permit Program, requires states to develop and enforce an operating permit program for major sources of regulated air pollutants. Generally, Army installations meeting the definition of "major source," as defined at 40 C.F.R. §70.2, must apply for a single permit covering all sources of air emissions on the entire installation. The Title V program differs substantially from the current method of permitting, where an individual activity on an installation, such as a boiler plant or incinerator, operates under its own permit.

Treating an entire installation as a source under Title V has significant consequences, including: subjecting more facilities to burdensome Title V requirements; reducing operational flexibility; and making the installation commander responsible for tenant activity emissions over which he or she has limited control. Consequently, the Army has urged its installations to consider obtaining state and EPA approval to treat certain tenant activities as individual sources, separate from the installation's Title V permit. If treated separately under Title V, many tenant activities would not be "major sources" and would not be subject to Title V requirements.

Fort Dix, New Jersey, has become the first Army installation to obtain such approval. New Jersey and EPA Region II have granted Fort Dix the authority to exclude fourteen tenant activities from its Title V permit. The exclusion covers virtually the entire array of potential tenant activities: private companies (banks, bus stations), state/county organizations, non-Department of Defense (DOD) federal agencies (2500-inmate federal prison operated by the Department of Justice), and non-Army DOD agencies (Navy Reserve Center, Air Force hospital, and Coast Guard Strike Force Team).

As the basis for excluding tenant activities, Fort Dix used arguments advanced by the Environmental Law Division.⁴⁰ The regulators granted approval because the Fort Dix commander did not have actual control over the day-to-day operations, nor funding authority, over the tenants. The regulators agreed that compliance could be better ensured by holding the tenant activity managers, not the installation commander, responsible for compliance.

All Army installations should carefully assess the advantages of separately permitting certain tenant activities. Installations with later deadlines may be able to use the Fort Dix precedent to their benefit. Mr. Hollis, Environmental Attorney-Advisor, Fort Dix.

Overview of the Title V Operating Permit Application Process

(This is the first note of a series intended to assist Environmental Law Specialists (ELs) in fulfilling their role in the Title V Operating Permit application process.)

The Title V Operating Permit program of the 1990 CAA Amendments,⁴¹ imposes major new compliance requirements

with the potential to adversely impact Army installations and their commanders. Over the next few years, most Army installations must apply for an installation-wide Title V operating permit. The Title V program is implemented by the states in accordance with federal regulations promulgated by the EPA.⁴² Installations subject to Title V will not be able to operate without a permit, unless the President grants an exemption. The program is completely new and very different from the existing state operating permit programs.

Army installations needing an operating permit must file an application prior to the state's application deadline. State deadlines vary greatly; many depend on EPA approval of the state's Title V program. Most state deadlines are in 1995-96. Submission of a timely and complete application is necessary for the installation to continue to operate pending issuance of the operating permit, which could take several years.

The Title V permit application is a lengthy and detailed document. For each source of emissions on the installation, the application must include the following: a source description; emissions data; applicable federal, state, and local air pollution control requirements; and monitoring, recordkeeping, and reporting requirements. Additionally, the application must include a description of the installation's current compliance status and, if necessary, a plan to rectify existing non-compliance. The "responsible official" for the installation must certify that, "based on information and belief formed after reasonable inquiry, the statements in the [application] document are true, accurate, and complete."⁴³ In most cases, the responsible official will be the installation commander, who cannot delegate the Title V responsibilities.⁴⁴

State regulators will write an installation's Title V operating permit based on the information that the installation provides in its Title V application. (consider submitting a draft permit along with the application.) By law, applications must be timely, accurate, and complete.⁴⁵ Additionally, installations should carefully craft applications to avoid unnecessary limitations on operational flexibility and future compliance problems. To achieve these objectives, installations must devote significant time, resources, and expertise to planning and preparing for the submission of the Title V application. Installations should allow at least six months after completing an emissions inventory to effectively complete the application process.

⁴⁰ See Environmental Law Division Notes, *Clean Air Act Definition of "Major Source" Under the Title V Operating Permit Program*, ARMY LAW., Aug. 1994, at 50-51.

⁴¹ 42 U.S.C. §§ 7661-7661f (1994).

⁴² 40 C.F.R. pt. 70 (1994).

⁴³ *Id.* § 70.5(d).

⁴⁴ *Id.* § 70.2.

⁴⁵ *Id.* § 70.5.

With the state's Title V application deadline as the target, installations should initially develop a plan to prepare and submit a timely, complete, and accurate Title V application that will result in the most favorable permit terms possible. The plan should establish milestones and provide for necessary resources and funding. Installation staff should identify and quickly resolve problems early in the planning stage. The staff should keep in mind that failure to meet the application deadline will give rise to serious legal problems.

Preparation of a Title V application is technically complex and time consuming. Army installations generally will not have the necessary resources nor expertise to prepare applications in house. Consequently, installations will have to fund and allow sufficient time to obtain contractor support. Installations should be aware that, with many state application deadlines approaching, obtaining experienced contractor support may become increasingly difficult. The Army Environmental Center (AEC) has established a program to assist installations in contracting out the application process. The point of contact at the AEC is Mr. Larry Webber, DSN 584-1204, (410) 671-1204.

In addition to contractor personnel, installations should assemble a cross-functional team to assist in the application process. The installation team should consist of environmental specialists, key facility operators, and the ELS. The active participation of operators is important to ensure that all emissions points have been accounted for, emissions estimates are correct, and operational needs are considered. The installation team should take a leading role in Title V planning and closely monitor completion of the Title V application to ensure that it is accurate and complete and affords maximum operational flexibility. Finally, on submission of the application, the team should follow the application through the permitting process, working closely with state regulators to ensure that the permit is properly drafted. Although not required, submission of a draft permit with the application should maximize the installation's chances of obtaining favorable permit language.

Because of the complexity of the application process, installations will be tempted to relegate preparation of the application, and the important decisions involved, to contractor personnel. This could be a costly error in terms of the loss of operational flexibility and potential liability for the responsible official and the Army, should the contractor make mistakes or fail to appreciate the installation's mission (in peace and war) and organizational structure. The installation's technical and legal staff must ensure that the installation can carry on under the permit.

Additionally, Title V program requirements and responsibilities do not end with submission of the permit application. To the contrary, Title V imposes major new compliance responsibilities on installations that will pose an ongoing challenge for the installation staff. Installation personnel, including the ELS, must be actively involved with and understand Title V implementation from the beginning. Installations that leave preparation of the Title V application solely to contractors, who "take their expertise home" after the application is submitted, will be handicapped in meeting the ongoing Title V responsibilities and addressing future compliance issues.

The installation team should consider carefully the options available to the installation under Title V, and develop a permitting strategy that will afford maximum operational flexibility and avoid future compliance problems. For example, installations can avoid onerous requirements and restrictions by working with regulators to appropriately divide installations into multiple sources under Title V, as well as under the CAA New Source Review programs (requiring preconstruction permits for significant modifications on the installation). Additionally, the team should consider creating federally enforceable limits on the installation's or a specific facility's potential to emit air pollutants, creating synthetic minor status and avoiding requirements applicable to major sources. These and other issues relating to the Title V application process will be addressed in upcoming editions of the *Bulletin*. Major Teller.

Contract Law Notes

Streamlining the Development of Memoranda of Understanding in International Cooperative Programs

The Federal Acquisition Streamlining Act of 1994¹ (FASA) took a significant step toward simplifying the federal government's procedures for procuring routine goods and services.² Procurements of major defense systems, however, never are routine, and, if anything, are likely to become increasingly more complex and difficult in the future.³ Unfortunately, in today's new world order of declining defense budgets and proliferating threats, neither the United States nor its allies can unilaterally afford the financial investments necessary to meet many of today's defense technology challenges.

In recognition of these challenges, and pursuant to Department of Defense (DOD) guidelines requiring system developers to participate in cooperative programs with United States allies in preference to purely domestic programs,³ the military services are entering an increasing number of Memoranda of Understanding (MOUs) providing for the cooperative development of new defense technologies. However, with the typical time required to complete these agreements generally approaching two years, and considering the importance of rapid program progress to keep pace with changing technologies, the need to streamline the MOU negotiation process became apparent as well. Therefore, recent DOD guidance has provided new, streamlined procedures to shorten the MOU development process. These procedure should help the

DOD increase its use of cooperative programs to meet changing mission needs in today's new world order.

The Old Procedures

The procedures formerly used to obtain authority to negotiate MOUs for system development efforts were specified in a DOD Directive entitled "International Agreements."⁵ This directive continues in effect for international agreements that are *unrelated* to research, development, testing, and evaluation (RDT&E) of weapons systems.⁶ By memoranda dated 12 October 1994⁷ and 13 February 1995,⁸ however, the Office of the Assistant Secretary of Defense for Dual Use Technology and International Programs promulgated new procedures applicable during the negotiation of RDT&E MOUs related to new weapons systems.

Under the old procedures, an early step in pursuing a cooperative development MOU was submitting a request to the Under Secretary of Defense for Acquisition and Technology⁹ (USD(A&T)) for authority to negotiate¹⁰ the proposed MOU. The following were required attachments to the request for authority to negotiate:

- A draft text of the proposed agreement, or an explanation for the unavailability of such a draft;
- A legal memorandum stating the legal authority for the obligation proposed

¹Pub. L. No. 103-355, 108 Stat. 3243 (1994).

²See, e.g., *id.* Title VIII (promulgating new procedures for use in acquisitions of commercial items).

³Today's weapon systems continue to push the technology envelope, and present developmental challenges requiring millions of manhours, billions of dollars, and gigabytes of computer code to overcome.

⁴DEP'T OF DEFENSE, DIRECTIVE 5000.1, DEFENSE ACQUISITION, pt. 1, para. B.4.b. (23 Feb. 1991).

⁵DEP'T OF DEFENSE, DIRECTIVE 5530.3 (11 June 1987, & C1 18 Feb. 1991) [hereinafter DOD DIR. 5530.3].

⁶DOD Directive 5530.3 is under revision to reflect the recent changes. See Memorandum, The Deputy Secretary of Defense, subject: Streamlining the Development of International Research and Development (R&D) Agreements (14 Sept. 1994) [hereinafter DEPSECDEF Memo]. The new procedures described *infra* already are in effect.

⁷Memorandum, Principal Deputy Assistant Secretary of Defense for Dual Use Technology Policy and International Programs, subject: Streamlining the Development of International Research and Development (R&D) Agreements (12 Oct. 1994) [hereinafter October 1994 Streamlining Memo].

⁸Memorandum, Principal Deputy Assistant Secretary of Defense for Dual Use Technology Policy and International Programs, subject: Streamlining the Development of International Research and Development (R&D) Agreements—REVISION 1 (13 Feb. 1995).

⁹See DOD DIR. 5530.3, *supra* note 5, secs. I, M. Section I required submission of requests for authority to negotiate an MOU to the Under Secretary of Defense for Policy, unless authority to approve an international agreement had been delegated to another official. Paragraph M.6.b. delegated this authority to the USD(A&T) for cooperative RDT&E programs, and the USD(A&T) routinely acted as the approval authority for MOUs related to these cooperative efforts.

¹⁰This step of the process was commonly known as the Request for Authority to Negotiate (RAN) phase of the MOU negotiation process.

under the MOU, and an explanation of all relevant legal considerations;

- A fiscal memorandum detailing the estimated cost of the obligation to be assumed by the United States under the proposed MOU, and the source of the required funds;
- A technology security risk assessment; and,
- Any other documents the approving official determined necessary to support a decision.¹¹

Following a grant of authority to negotiate the MOU, the negotiators could begin discussions with potential international partners. During the give and take of negotiations over a several month period, departure from the proposed language of the previously approved draft MOU was common.

After completing all discussions with cooperative partners, the old MOU procedures required submission of the negotiated MOU to the USD(A&T), along with a request for authority to conclude¹² the agreement. Changes from the originally proposed MOU language required explanation, and the review period for the final negotiated text of proposed MOUs usually was as long as or longer than the period required for the original request for authority to negotiate.

Unfortunately, this duplicative procedure proved both lengthy and complicated.¹³ Recognizing that the delays and complexity inherent in the old process impeded the effective pursuit of international cooperation in the research and development of critical technologies,¹⁴ the DOD has adopted interim procedures that should considerably shorten the time required for DOD components and agencies to develop and negotiate cooperative development MOUs.

The New Procedures

The new procedures eliminate most of the duplication involved in the old process. Rather than requiring the submission of a draft MOU as an attachment to an initial request to the USD(A&T) for authority to negotiate, the new procedures

require only a more simplified request for authority to develop¹⁵ an MOU as the initial submission in the process. This request is typically three to six pages in length,¹⁶ and it provides a more summarized description of the proposed MOU than the old request for authority to negotiate. The program or project office submitting a request for authority to develop an MOU receives approval from the USD(A&T) more expeditiously under the new procedures than in the past,¹⁷ because there is less to review. Additionally, actual negotiations with allied nations should be somewhat less constrained than under the old procedures, when negotiators were cautious in deviating from the terms of a draft MOU which had received prior USD(A&T) approval. Under the new procedures, negotiators will have only an approved summary statement of intent to negotiate an MOU, and should be more flexible in bargaining with potential program partners.

This change in procedures does not necessarily mean that the Office of the Secretary of Defense (OSD) has dramatically reduced its oversight of the MOU negotiation process. Instead, modern technology recently has reduced the need for a review within OSD of the precise wording of every MOU for which negotiations have not yet begun. Rather than developing MOUs from scratch, or by "cutting and pasting" from prior MOUs (as was frequently done in the past), an MOU that a United States negotiating team puts on the table today is likely to be the product of a software package developed by the Navy International Programs Office (Navy IPO) known as the International Agreement (IA) Generator.¹⁸ An MOU produced using the IA Generator generally will pass muster with the DOD General Counsel and other OSD offices in the reviewing chain for new MOUs, because each of the permutations possible within the IA Generator has previously received coordinated review within OSD. Thus, only proposed deviations from the IA Generator are addressed in a request for authority to develop an MOU—not every provision of the proposed MOU as was done in requests for authority to negotiate MOUs under the old procedures.

After receiving approval to develop an MOU, a United States negotiating team works with one or more international partners to draft the provisions of the MOU in language and terms acceptable to all parties. An additional benefit of using the IA Generator to produce the initially proposed MOU language is that the United States position on recurrent issues in MOU negotiations should be more consistent. Consistency is

¹¹ DOD DIR. 5530.3, *supra* note 5, para. 1.3.

¹² This phase of the process was known as Request for Authority to Conclude (RAC) phase of the MOU negotiations.

¹³ See DEPSECDEF Memo, *supra* note 6, at 1.

¹⁴ *Id.*

¹⁵ This submission is called a Request for Authority to Develop (RAD) an MOU. Thus, the new procedures are commonly referred to as "RAD/RAC," while the old procedures were called "RAN/RAC."

¹⁶ See October 1994 Streamlining Memo, *supra* note 7, at 2.

¹⁷ The goal for approval of a RAD to initiate the MOU development process is thirty days. See DEPSECDEF Memo, *supra* note 6, at 1.

¹⁸ For more information on the Navy IPO IA Generator project, contact Navy IPO-03B at (703) 604-0152.

improved because the IA Generator (and updates to it promulgated by Navy IPO) provide for a common opening position, and capture "lessons learned" from prior negotiations. Consequently, program or project offices considering deviations from the IA Generator should carefully assess the wisdom of these deviations, both from a substantive perspective, and from the standpoint of expediting the OSD's initial review of the request for authority to develop the MOU, and its review of the request for authority to conclude it.

Once a draft MOU has been negotiated to its "final" form, the OSD performs a detailed review of the proposed agreement similar to that done with both OSD submissions under the old procedures. To maintain momentum in the negotiations process, staffing in the OSD and coordination with the Departments of State and Commerce normally should take not longer than two months.¹⁹ Once this review is complete, the official to whom authority to conclude the MOU is delegated and counterparts from other participating nations sign the agreement, and a new cooperative R&D program is born.

Looking to the Future

Whether these streamlined MOU negotiation procedures will achieve the desired reduction in MOU development times and shorten the time needed to complete an MOU from about two years to approximately six months, remains to be seen. Some reduction in the time necessary to conclude an MOU is likely, but the dynamics of working with many international partners on programs of ever increasing complexity may simply result in the reallocation of time saved in the OSD review and approval process to actual negotiations with allies instead. Regardless of the time savings, the standardization of the United States negotiating position on frequently arising issues, and the capture of lessons learned through universal use of the IA Generator within the DOD should improve the success rate of United States MOU negotiating teams greatly. The successes of these teams will result in more United States partici-

pation in international programs, and promote better management of them as well. Both of these end results are critical to the security of the United States and its allies in today's new world order.

What these changes make equally clear is that nearly every aspect of the federal acquisition process is on the table today for potential streamlining opportunities. Last summer, the requirements generation/technical end of the acquisition process received a major realignment, through the reversal of the prior preference for military specifications over commercial product descriptions or performance specifications in systems acquisitions.²⁰ Last fall, the FASA made numerous changes in the way that the United States government conducts its procurements, and these changes will be fully implemented by this fall.²¹ Now international program management has been streamlined as well.

The lesson for contract law practitioners is twofold. First, the only certainty about practice in this field is change, which is both evolutionary and, ever more frequently, revolutionary. Second, any additional suggestions for improvements in the acquisition system are likely to find a receptive ear in today's streamlining-oriented environment. Practitioners with good ideas for more changes or reforms in the acquisition process would do well to package them as streamlining opportunities and submit them for consideration while the environment is ripe for further acquisition reforms.²² Major DeMoss.

Costly Noncompliance with the Assignment of Claims Act: A Reminder for Counsel and Disbursing Officers

In 1994, with the FASA, Congress amended the Assignment of Claims Act²³ for the first time since 1951. In addition to housekeeping changes to the statute,²⁴ the FASA gave the President power to determine that payments to contractors'

¹⁹ See DEPSECDEF Memo, *supra* note 6, at 2.

²⁰ See Contract Law Note, *A Precursor of Things to Come: Fundamental Change in the Department of Defense's Use of Military Specifications*, ARMY LAW., Oct. 1994, at 64.

²¹ See Pub. L. No. 103-355, § 10001, 108 Stat. 3243, 3404 (1994) (specifying the earlier of the effective date of the FASA implementing regulations or 1 October 1995 as the effective date for most of the provisions of the statute).

²² Submission of streamlining opportunities as suggestions under the Army Ideas for Excellence Program may be appropriate in some instances. See 5 U.S.C. § 4503; 10 U.S.C. § 1124; DEP'T OF ARMY, REG. 5-17, THE ARMY IDEAS FOR EXCELLENCE PROGRAM (19 Oct. 1990).

²³ See 31 U.S.C. § 3727, 41 U.S.C. § 15. The *Federal Acquisition Regulation (FAR)* explains that "assignment of claims":

means the transfer or making over by the contractor or bank, trust company, or other financial institution, as security for a loan to the contractor, of its right to be paid by the Government for contract performance.

GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 32.801 (Apr. 1, 1984) [hereinafter FAR]. For a general discussion of issues associated with the Assignment of Claims Act, see Heidi M. Schooner & Steven L. Schooner, *Look Before You Lend: A Lender's Guide to Financing Government Contracts Pursuant to the Assignment of Claims Act*, 48 BUS. LAW. 535 (1993).

²⁴ Although the actual changes to the Assignment of Claims Act were minor, rather than simply adding or replacing one paragraph, the FASA replaced the original text in its entirety. The FASA amendments also updated references to certain agencies, such as replacing the "Atomic Energy Commission" with the "Department of Energy." The FASA also reorganized the statute and deleted references to pre-1951 conditions, for example, references to contracts awarded before 1940.

assignees (financial institutions, most often banks) would not be subject to reduction or setoff.²⁵

While this expanded authority to permit "no-setoff commitments" may seem inconsequential, contracting officers, disbursing officers, installation contracting counsel, and trial counsel must remain vigilant in ensuring compliance with any assignments properly made by contractors to financial institutions. Last year, *Bank of America National Trust & Savings Ass'n v. United States*²⁶ provided an excellent example of the costly ramifications of failing to properly monitor assigned payments.

Bank of America is particularly unsettling because it involved routine procedures for the financing of government contracts. However, a simple oversight in the monitoring of an assignment many years later transformed *Bank of America* into a costly mistake.

Frequently, contractors obtain financing necessary to perform their contracts by "assigning" their payments (or "receivables") from the government to their lenders as collateral for their loans.²⁷ Once this assignment is in place (and the contractor and financial institution have properly notified the government of the assignment),²⁸ the government makes all contractual payments (as they come due) directly to the financial institution, rather than to the contractor.

Despite their ability to obtain an assignment of contract receivables, financial institutions may be reluctant to lend money to contractors when they fear that a contractor's obligations, outside of the financed contract, might cause the government to interrupt the contractor's payments. The solution

is to include a no-setoff clause in the contract.²⁹ The *FAR* defines a "no-setoff commitment" as:

a contractual undertaking that, to the extent permitted by the Act, payments by the designated agency to the assignee under an assignment of claims will not be reduced to liquidate the indebtedness of the contractor to the Government.³⁰

In *Bank of America*, the contractor executed a security agreement with the bank in 1979, granting the bank a security interest in, among other things, the contractor's after-acquired accounts (its receivables) and contract rights.³¹ In 1979 and 1980, the contractor entered into a number of supply contracts for military clothing with the Defense Logistics Agency (DLA). On the award of each contract, the contractor assigned the proceeds and rights associated with each contract to the bank as security for loans to finance the contractor's performance of the contracts.

Consistent with the Assignment of Claims Act, the government acknowledged and accepted these assignments. Throughout the performance of these contracts, the government made payments directly to the bank for any sums owed the contractor.

In 1980, the contractor borrowed, and the bank lent, additional money. The bank issued an additional \$500,000 loan to the contractor based on a Small Business Association (SBA) ninety percent guarantee on that loan (the SBA loan guarantee application disclosed the bank's preexisting lien position). The collateral for this loan included another lien against the

²⁵ See 41 U.S.C.A. § 15(e), which replaces the words "in time of war or national emergency proclaimed by the President . . . or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such a manner" with the words "upon a determination of need by the President[.]" (The amendment requires that such a determination be published in the *Federal Register*.) The FASA change renders irrelevant the reference in 50 U.S.C. § 1651(a) to 41 U.S.C. § 15. The legislative history offers little explanation for the amendment other than noting that it was recommended by the Advisory Panel on Streamlining and Codifying Acquisition Laws pursuant to Section 800 of the National Defense Authorization Act for Fiscal Year 1991 (the "Section 800 Panel"). Pub. L. No. 101-510, § 800, 1994 U.S.C.A.N. (108 Stat.) 2561, 2586.

²⁶ 23 F.3d 380 (Fed. Cir. 1994), *reh'g denied* (June 23, 1994).

²⁷ The government typically will not make payments to a contractor before the contractor actually delivers the first lot of supplies or the first progress payment is due. Nonetheless, when the contractor receives its authorization to proceed, the contractor must be prepared to hire personnel, obtain raw materials, purchase or rent equipment, and maintain facilities (such as warehouse, manufacturing, or office space).

²⁸ *Federal Acquisition Regulation* 32.805 details the procedures for execution, notice, acknowledgment, and release of assignments. *Federal Acquisition Regulation* 32.805(a) addresses execution of the assignment by the contractor; 32.805(b) requires filing copies with each of the parties; 32.805(c) describes the format for the notice of assignment; and 32.805(d) articulates the examination required by the government before acknowledging the assignment. See also DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 232.805, Procedures, (1 Dec. 1984), which addresses certain responsibilities of the administrative contracting officer and the disbursing officer. See also *Trust Co. Bank of Middle Georgia v. United States*, 24 Cl. Ct. 710 (1992), for an example of a bar to recovery where a financial institution failed to comply with the statutory notice requirements.

²⁹ The no-setoff commitment is incorporated into the contract by including *Alternate I* (Apr. 1984) with the *Assignment of Claims* (Jan. 1986) clause. FAR 52.232-23, *supra* note 23. See also *id.* 32.803(d), to be revised pursuant to the FASA by FAR Case 94-761, 60 Fed. Reg. 24220, 24241 (1995); 60 Fed. Reg. 3988 (1995).

³⁰ FAR 32.801, *supra* note 23.

³¹ For a more complete recitation of the facts, see the appellate court decision at *Bank of America National Trust & Savings Ass'n v. United States*, 23 F.3d 380 (Fed. Cir. 1994) and the lower court decision at 39 Cont. Cas. Fed. (CCH) ¶ 76,657.

contractor's receivables, and the contractor executed another security agreement granting the bank a security interest in moneys owed to or subsequently acquired by the contractor. In 1981, the bank made another, smaller, SBA guaranteed loan to the contractor—that loan was also "collateralized" by the government receivables through a future advances clause of the 1980 security agreement.

Soon thereafter, the contractor defaulted on all of its loans. The bank promptly demanded payment from the SBA on the loans it guaranteed. The SBA paid the bank ninety percent of the loan amounts on the guaranteed loans (the SBA payments did not cover the bank's earlier nonguaranteed loans).

The DLA eventually terminated two of the contracts, and the contractor commenced litigation before the Armed Service Board of Contract Appeals (ASBCA). Seven years later, the DLA and the contractor agreed to a settlement of more than \$600,000—with Contract Disputes Act (CDA) interest, the settlement exceeded \$1.1 million. Unfortunately, the government paid the settlement amount directly to the contractor.

Not surprisingly, the bank requested that the government pay it the \$1.1 million settlement amount. The DLA, conceding that the money should have been paid to the bank, wrote to the contractor demanding repayment of the money. The contractor refused to return the money.

The bank, as assignee, filed suit in the Court of Federal Claims (CFC).³² In responding to the bank's complaint, the DLA asserted the SBA's superior right to the money as an affirmative defense. The DLA also filed a third-party complaint against the contractor, seeking reimbursement for the sum erroneously paid pursuant to the settlement.

On motions for summary judgment, the CFC held that: (1) the DLA had paid the contractor erroneously and was entitled to repayment, and (2) the bank had no claim on the money because it had assigned its rights to the SBA.³³ This result

allowed the DLA only a brief reprieve because the CFC's decision was overturned completely on appeal.

First, the Court of Appeals for the Federal Circuit (CAFC) vacated the lower court's ruling demanding that the contractor repay the \$1.1 million to the DLA.³⁴ The CAFC held that:

the government agreed to settle [the] claims and voluntarily relinquished its right to disturb the settlement. . . . In the absence of any fraud, misdirection, or concealment, the government may not recover funds paid in good faith and to the satisfaction of the interested parties.³⁵

Moreover, the appellate court precluded the DLA from seeking recovery of the payments through a third-party complaint, "The government should not be allowed to do indirectly what it is prohibited from doing directly."³⁶ The contractor, therefore, kept the \$1.1 million it received in settlement of the litigation.

Unfortunately, the appellate court also held that the bank should recover from the government the amount due under the settlement with the contractor. The court held that the bank provided timely notice to the government of the contractor's assignment, and that the bank never relinquished its right to the contractor's payments. The government's payment to the contractor, based on the settlement, should have gone to the bank. That the government may have made an erroneous payment did not bar the bank's claim.³⁷

The court also rejected the DLA's argument that it had a right to set off the amount the contractor owed to the SBA against the money owed to the bank. First, the bank enjoyed a superior security interest in that it secured its interest first in time—"the SBA took its interest subject to the preexisting interest retained by the bank. Indeed, the record demonstrated that the SBA clearly knew of the bank's senior interest in the contract payments."³⁸

³²Prior to the Federal Courts Administration Act of 1992, Title IX, Pub. L. No. 102-572, 106 Stat. 4506, when this action commenced, this court was the United States Claims Court.

³³39 Cont. Cas. Fed. (CCH) ¶ 76,657 (Cl. Ct. No. 90-3916C, Oct. 16, 1992).

³⁴In a separate opinion, Judge Mayer concurred in the judgment, but wrote separately because he believed that the CFC lacked jurisdiction to address the government's claims against the contractor. *Bank of America*, 23 F.3d at 385-88.

³⁵*Id.* at 383 (citations omitted). The court explained that, in return for the contractor's agreement to cease the litigation, the government had agreed to voluntarily relinquish its right to disturb the settlement. To the extent that the contractor upheld its end of the bargain—discontinuing the litigation—the government also must be bound by the agreement.

³⁶*Id.* at 384. In settling the litigation before the ASBCA, the government waived its right to challenge the board's decision (based on the parties' settlement agreement and stipulation) awarding payment to the contractor. That the government was now the defendant in an action brought by the bank did not permit the government, through the use of a third-party complaint, to challenge the binding settlement agreement.

³⁷*Id.*

³⁸*Id.* (referencing *United States v. McDermott*, 113 S. Ct. 1526, 1531 (1993)). In *McDermott*, the Court held that the "first-in-time" rule would not apply to a government tax lien in the same manner as between two private lenders. "The Government . . . cannot indulge the luxury of declining to hold the taxpayer liable for his taxes; notice of a previously filed security agreement covering after-acquired property does not enable the Government to protect itself." *McDermott*, 113 S. Ct. at 1531.

Moreover, because the contracts contained a no-setoff clause, the bank, pursuant to the Assignment of Claims Act, "is not simply an ordinary assignee."³⁹ As the court explained:

The inclusion of "no set-off" clauses alleviates some of the uncertainty that would otherwise hinder financing by ensuring assignees a stream of payments unaffected by the contractor's potentially numerous "obligations to the United States not imposed by the contract from which the payments flowed."⁴⁰

The contractor's liability to the SBA was on the notes (or the commercial paper), rather than deriving from the contractor's actions in performing the contracts (which had been the subject of the ASBCA litigation and fully resolved by the settlement). Because the contractor's liability to the SBA on the notes was independent of the contract, the contractor would owe the money to the SBA even if there was no contract. This is the scenario from which the no-setoff clause provides financial institutions protection. Consequently, the government was barred from any attempt to setoff the contractor's liability to the SBA against the money owed the bank. The contractor, therefore, kept its \$1.1 million, and the government had to pay the bank as well.⁴¹

While this costly error could have been avoided with proper communication and coordination, it is easy to understand how this problem could arise. In *Bank of America*, the loan transactions and security agreements took place in 1979 and 1980, litigation commenced in 1981, and the settlements were not consummated until 1988. The CDA litigation before the ASBCA had nothing to do with the assignment of the contractor's payments. The bank was not a party to the ASBCA litigation. Given the duration of the litigation, the case likely changed hands in the litigation office a number of times. Trial counsel, settling the ASBCA litigation in 1988, was far removed from the disbursing officer who had not paid a con-

tractual invoice on these contracts since 1980. How could the trial counsel have known of the assignment?

Minor changes to the regulations might avoid a recurrence of the *Bank of America* scenario.⁴² For example, a cautionary instruction could be added to regulations that supplement the DFARS CDA Disputes guidance,⁴³ such as:

The assigned trial attorney shall consult with the contracting officer, before any settlement payments are made to a contractor, to ensure that no valid assignment of claims requires that the monies be paid to a financing institution pursuant to the Assignment of Claims Act. See FAR Subpart 32.8.

Absent any other source of information, before making a payment to a contractor resulting from litigation, trial counsel should contact the contracting officer (or, if need be, the disbursing officer) to confirm that the contractor had not assigned its right to payments to a financing institution. In *Bank of America*, one telephone call might have avoided a costly mistake. Captain Schooner, Individual Mobilization Augmentee.

Criminal Law Notes

Manual for Courts-Martial Update

On 12 May 1995, the President signed the 1995 amendments to the *Manual for Courts-Martial (Manual)*. The amendments took effect on 10 June 1995. On 15 May 1995, an electronic message containing the complete text of the 1995 amendments went to the field. For further information, consult this electronic message as well as the article appearing in the April 1995 issue of *The Army Lawyer* which analyzed the 1995 amendments.

A new softcover version of the *Manual*, which will contain Change 7 and the 1995 amendments, should be published by midsummer 1995. Lieutenant Colonel Borch, Criminal Law Division, OTJAG.

³⁹ *Bank of America*, 23 F.3d at 385.

⁴⁰ *Id.* (citing *Central Bank v. United States*, 345 U.S. 639, 643 (1953); *Produce Factors Corp. v. United States*, 467 F.2d 1343, 1348 (Ct. Cl. 1972)).

⁴¹ This litigation continues in the Court of Federal Claims over the amount of recovery to which the bank is entitled.

⁴² Arguably, the responsibility for ensuring that CDA judgment payments are properly paid to assignees, rather than to assignors, could be delegated to the General Accounting Office (GAO), which pays contractors from the Indefinite Judgment Fund, 41 U.S.C. § 612(a), 31 U.S.C. § 1304. If the agency first notices the payment error at the time that the agency reimburses the GAO for the payment made from the judgment fund, pursuant to 41 U.S.C. § 612(c), the damage already is done. Amended regulations could require that, before disbursing payments from the Indefinite Judgment Fund, the GAO must confirm, with the contracting agency, that no assignments are in place or, in the alternative, institute (and cross-check against) a government-wide common database containing information on all assignments made (by contract numbers or contractor names). Because of the administrative burden associated with this type of an undertaking, the effort may not be justified. Absent such a global solution, each agency must endeavor to avoid improper payments.

⁴³ See, e.g., *Air Force Federal Acquisition Regulation Supplement* 5333.290(a)(2) or (a)(3), which address Air Force procedures in ASBCA appeals; *Army Federal Acquisition Regulation Supplement (AFARS)* 33.212-90(a)(3), which discusses the Army's contracting officer's authority to settle, or 33.212-90(a)(2)(ii), which tasks local counsel to the contracting officer with assistance and support of the litigation; AFARS appendix A, ¶ 4(a)(ii), which describes the trial attorney's litigation file; *Navy Acquisition Procedures Supplement* 5233.9002(e), which discusses the Navy's Litigation Report; and *Defense Logistics Agency Acquisition Regulation* 33.212, which addresses the DLA's contracting officer's duties on appeal.

United States v. Burnell and United States v. Gansemer: The COMA Allows Greater Government Latitude in Pretrial Agreement Negotiations

Introduction

In *United States v. Burnell*,⁴⁴ the United States Court of Military Appeals (COMA)⁴⁵ held that under Rule for Courts-Martial (R.C.M.) 705(c),⁴⁶ when considering a proposed pretrial agreement, the government may insist that an accused waive his right to trial by members as a condition of that pretrial agreement.⁴⁷ In *United States v. Gansemer*,⁴⁸ the COMA held that an accused's offer to waive a hearing before an administrative discharge board was a proper and valid condition of a pretrial agreement. Both of these cases give the government considerably greater latitude in negotiating pretrial agreements.

The Case of United States v. Burnell

In *Burnell*, the accused was charged with larceny, forgery, and false swearing. As part of his pretrial agreement, the

accused agreed to waive his right to request trial before members in exchange for a sentence limitation of twenty-four months.⁴⁹ The military judge sentenced the accused to a dishonorable discharge, forfeiture of all pay, a fine of \$2500, and confinement for ten years.⁵⁰ During pretrial negotiations the accused was advised that if he wanted a panel for sentencing, the government would no longer agree to a two-year sentence limitation.⁵¹

Prior to the *Burnell* decision, the COMA "did not condone the inclusion of such a provision in military pretrial agreements."⁵² The COMA would, however, uphold agreements waiving members for sentencing if the proposal originated with the defense and "was a freely conceived defense product."⁵³ Despite this language, the ACMR⁵⁴ held in *United States v. Andrews*⁵⁵ that under R.C.M. 705, the government was permitted to propose as a term of the pretrial agreement that the accused elect trial by military judge alone.⁵⁶ The ACMR also held that the government could condition a sentence limitation on whether the accused elected trial by military judge alone.⁵⁷ In upholding the plain language of Change 5 to R.C.M. 705, the ACMR in *Andrews* recognized legitimate

⁴⁴40 M.J. 175 (C.M.A. 1994).

⁴⁵On October 5, 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the United States Court of Military Appeals (COMA) to the United States Court of Appeals for the Armed Forces (CAAF). The same act changed the names of the Courts of Military Review to the Courts of Criminal Appeals. Both *Burnell* and *Gansemer* were decided prior to this change. This note will refer to courts by the name applicable at the time that the decision was rendered.

⁴⁶MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 705(c)(2) (1984) (C5, 6 July 1991) [hereinafter MCM]. *Permissible terms or conditions*, provides that "this rule does not prohibit either party from proposing the following additional conditions," including, the waiver of "the right to trial by court-martial composed of members," under R.C.M. 705(c)(2)(B). Rule for Courts-Martial 705(c) permits pretrial negotiations to be initiated "by the accused, defense counsel, the staff judge advocate, the convening authority, or their duly authorized representatives." Change 5 applies to all cases in which charges are preferred on or after 6 July 1991. Exec. Order No. 12767, § 4(c) (June 27, 1991) [hereinafter R.C.M. 705].

⁴⁷*Burnell*, 40 M.J. at 176.

⁴⁸38 M.J. 340 (C.M.A. 1993).

⁴⁹*Burnell*, 40 M.J. at 175.

⁵⁰*Id.*

⁵¹*Id.* On appeal, the accused asserted that he was advised by his trial defense counsel that there could be "no deal" if he desired trial by members. The COMA and the United States Army Court of Military Review (ACMR) adopted the assertions of the defense counsel. *Id.* at 177.

⁵²*United States v. Zelenski*, 24 M.J. 1 (C.M.A. 1987); *United States v. Schmeltz*, 1 M.J. 8 (C.M.A. 1975).

⁵³*Zelenski*, 24 M.J. at 2. See also *United States v. Schaffer*, 12 M.J. 425, 427 (C.M.A. 1982).

⁵⁴Now designated as The United States Army Court of Criminal Appeals (ACCA). See *supra* note 45.

⁵⁵38 M.J. 650 (A.C.M.R. 1993).

⁵⁶*Id.* at 653.

⁵⁷*Id.* In *Andrews*, the ACMR noted that prior to 1991 (per Change 5, MCM *supra* note 46, R.C.M. 705(c)(2)), an accused was permitted to bargain away his or her right to be sentenced by members "so long as the government did not require (or was perceived as requiring) waiver of members as a condition precedent to acceptance of a pretrial agreement." *Id.* at 652. See also *United States v. McClure*, A.C.M.R. No. 9300748, (slip op. 23 Nov. 1993). In *McClure*, the convening authority's handwritten counter offer on a pretrial agreement stated: "The foregoing is accepted only if the accused elects to be tried by military judge alone." *Id.*

"time-and-manpower considerations" in the government's desire to seek a waiver of court members,⁵⁸ and, that procedures implemented to achieve that legitimate goal are not contrary to military law or public policy.⁵⁹

However, the ACMR's decision in *Andrews*⁶⁰ did not specifically address whether a convening authority could institute a policy that all pretrial agreements include waivers of the right to sentencing before members. The ACMR indicated that the Uniform Code of Military Justice, Article 16, and the Sixth Amendment protected the right of the accused to a "viable choice regarding forum selection."⁶¹ *Andrews* also specifically made reference to the COMA's prior condemnation of "systemized government interference with the appellant's right to forum selection."⁶² *Burnell*, seems to discount such concerns; noting that waivers may "be required by the convening authority before he or she will even consider acceptance of any pretrial agreement."⁶³

In *Burnell*, Judge Cox emphasized that the accused's decision to waive members was both voluntary and intelligent and also observed that the accused enjoys "unrestricted access to the ultimate remedy—that is, the trial—together with the total panoply of rights and opportunities that entails."⁶⁴ *Burnell* is consistent with Judge Cox's prior concurring opinion in *United States v. Jones*,⁶⁵ where he observed:

[w]ith a few exceptions (including, but not limited to, the rights to counsel, allocution, appeal, and the right to contest jurisdiction), I see no problem with the Government's

sponsorship, originating, dictating, demanding, etc., specific terms of pretrial agreements.⁶⁶

Burnell emphasized that plea agreements that are induced by threats, improper harassment, misrepresentation, or improper promises,⁶⁷ will not be upheld, but, fear of stringent punishment, "does not rise to the level of involuntariness contemplated by the Constitution."⁶⁸

The Case of United States v. Gansemer

In *Gansemer*, the accused, a Marine Corps lance corporal, was charged with wrongful use and possession of drugs and his case was referred to a special court-martial. In a pretrial agreement, the accused proposed a confinement limitation and, as further inducement, the accused agreed to waive his right to a hearing before an administrative discharge board⁶⁹ if the court did not impose a punitive discharge.

Lance Corporal Gansemer's approved sentence included both confinement and a bad conduct discharge, thereby nullifying the administrative discharge waiver provision. Despite the accused's admission that his decision to plead guilty was unaffected by the provision in question,⁷⁰ the COMA granted review on the issue of whether the waiver was a proper condition of a pretrial agreement.

In the opinion, Judge Cox, again writing for the majority, emphasized the value of these waiver provisions as important and valuable bargaining chips that, if denied, merely serve to deprive the accused of "the right to bargain for his or her free-

⁵⁸ *Andrews*, 38 M.J. at 653.

⁵⁹ *Id.*

⁶⁰ *Id.* at 650.

⁶¹ *Id.* at 653 (referring to *United States v. Schmeltz*, 1 M.J. 8 (C.M.A. 1975); see also *United States v. Zelenski*, 24 M.J. 1, 2 (C.M.A. 1987); *United States v. Ralston*, 24 M.J. 709, 710 n.1, (A.C.M.R. 1987) ("The unexplained inclusion of this type of waiver in a majority of the negotiated guilty pleas in a given jurisdiction over a significant time period may give rise to an inference that local command policy requires such a provision.").

⁶² *Andrews*, 38 M.J. at 652, (referring specifically to *Zelenski*, 24 M.J. at 2).

⁶³ *United States v. Burnell*, 40 M.J. 175, 176 (C.M.A. 1994) (emphasis added).

⁶⁴ *Id.* (quoting *United States v. Jones*, 23 M.J. 305, 309 (C.M.A. 1987)).

⁶⁵ 23 M.J. 305 (C.M.A. 1993).

⁶⁶ *Id.* at 308.

⁶⁷ *Burnell*, 40 M.J. at 176; *Brady v. United States*, 397 U.S. 742, 755 (1970).

⁶⁸ *Id.* at 343.

⁶⁹ 38 M.J. 340, 342 (C.M.A. 1993).

⁷⁰ *Id.*

dom."⁷¹ Judge Cox also noted the "decision on whether to bargain with the appropriate authority is not done in the blind,"⁷² but is based on the advice of competent counsel.

Judge Wiss (joined by Chief Judge Sullivan) concurring only in the result, expressed concern about a departure from "three decades of this court's precedent,"⁷³ regarding the role and scope of pretrial agreements. Judge Wiss pointed out that in past instances when the terms of pretrial agreements expanded beyond "charges, sentences, and pleas,"⁷⁴ appellate oversight focused on whether the provision had originated with the defense. The rationale being that "absent government overreaching, it may be presumed that an accused and his counsel know what is fair to him and in his best interests."⁷⁵

Additionally, Judge Wiss observed that pretrial agreements traditionally "involve some aspect of the military justice system and criminal proceedings."⁷⁶ The concurrence emphasizes the government's failure to tie "an umbilical cord between the criminal proceedings that emanated from the accused misconduct and administrative proceedings that may emanate from such misconduct."⁷⁷ Judge Wiss compared such agreements to provisions that would require the accused to forgo his or her next promotion; or, if convicted, accept immediate reassignment to a combat zone.⁷⁸ Responding to the concerns of "commingling" administrative measures with courts-martial, Judge Cox pointed out that "it has long been the law that an accused may ask for an administrative discharge in lieu of court-martial;"⁷⁹ emphasizing "if that is not already mingling administrative actions with punitive action, what is it?"⁸⁰

Conclusion

Ultimately, *Burnell* and *Gansemer* recognize the government's legitimate interests—time, expense, military mission—

in requiring an accused to forego his or her right to trial before members, or, to waive (potential) rights to posttrial administrative discharge proceedings. The COMA also appears to have clearly abandoned the largely artificial distinction of determining the "origin" of pretrial agreement terms, whatever their terms or conditions. The additional language in *Burnell*, suggesting that convening authorities may require waivers before they will accept any pretrial agreements, also departs from precedent and signals a likely expansion of the government's right to bargain in pretrial agreement negotiations.

Without expressly so stating, *Burnell* and *Gansemer* endorse the role of trial defense counsel (and the civilian bar) in protecting the rights of the accused during the pretrial process. Short of government abuse, overreaching, or command influence, there is less need to oversee or second guess decisions made by an accused that are based on advice from qualified counsel. Major Winn.

A New Expansion of the Good Faith Exception: *Arizona v. Evans*

In *Arizona v. Evans*⁸¹ the United States Supreme Court significantly expanded the good faith exception to the Exclusionary Rule. In *Evans*, the Supreme Court held that the good faith exception applies to evidence gathered as a result of a quashed warrant, where a clerical error by court personnel led police to believe that the warrant was still valid. This is a significant extension of the holding in *United States v. Leon*,⁸² in which the Supreme Court originally created the good faith exception. In *Leon*, the Court held that the Exclusionary Rule does not apply when the police act in good faith on a facially valid warrant, even though the warrant ultimately is found to be invalid. In *Evans*, the Court expanded the good faith exception by applying it, even though there was no warrant outstanding.⁸³

⁷¹ *Id.*

⁷² *Id.* at 342.

⁷³ *Id.* at 343. See *United States v. Jones*, 23 M.J. 305 (C.M.A. 1987); *United States v. Zelenski*, 24 M.J. 1 (C.M.A. 1987).

⁷⁴ *Id.*

⁷⁵ *Id.* at 344 (quoting *Jones*, 23 M.J. at 305 n.30).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 345.

⁷⁹ *Id.* at 342.

⁸⁰ *Id.*

⁸¹ 63 U.S.L.W. 4179 (U.S. Mar. 1, 1995).

⁸² 468 U.S. 897 (1984).

⁸³ *Evans*, 63 U.S.L.W. at 4184 (Stevens, J., dissenting).

In *Evans*, a Phoenix, Arizona, police officer spotted the accused, Isaac Evans, driving the wrong way down a one way street in front of the police station. The officer stopped Evans and entered his name into a computer terminal in his patrol car. The computer indicated that there was an outstanding warrant for Evans' arrest. Unknown to the officer, the warrant had been quashed seventeen days previously. The officer arrested Evans. While being handcuffed, Evans dropped a marijuana cigarette. A search of the accused's car incident to arrest revealed a bag of marijuana under the passenger seat.

At his trial for possession of marijuana, Evans argued that his arrest, based on the quashed warrant was invalid, and that the evidence seized during the arrest should be suppressed. Testimony at the suppression hearing suggested that the clerk of court's office never had notified the police that the warrant had been quashed. However, the trial judge suppressed the evidence seized during the arrest without making any finding whether court personnel or police personnel were responsible for the error. The Arizona Supreme Court upheld the trial judge's ruling, finding that the application of the Exclusionary Rule to court employees was appropriate.

The Supreme Court reversed the Arizona Supreme Court's decision. Chief Justice Rehnquist, writing the opinion of the Court, stated that the Exclusionary Rule should not be applied if court personnel were responsible for the error.⁸⁴ Justices Stevens and Ginsburg dissented.⁸⁵ Justice Stevens argued that the Exclusionary Rule should apply regardless of whether

police or court personnel were responsible for the mistake.⁸⁶ Justice Ginsburg argued that the Court should not have reversed the Arizona Supreme Court's decision because it was based on state law.⁸⁷

In *Evans*, the Supreme Court extended the good faith exception well beyond the factual situation to which it was originally applied in *Leon*. In *Leon*, the Supreme Court applied the good faith exception where a neutral and detached magistrate made a mistake in determining the existence of probable cause.⁸⁸ In *Evans*, the Court applied the good faith exception to a completely different kind of error: a mistake by court personnel in not informing the police that the warrant was no longer valid.⁸⁹

The Supreme Court's expansion of the good faith exception in *Evans* is consistent with a similar expansion of the good faith exception by the Court of Military Appeals (COMA).⁹⁰ In *United States v. Mix*,⁹¹ and *United States v. Chapple*,⁹² the COMA held that the good faith exception applies even when the commander⁹³ authorizing the search has no control over the area searched. In *Mix*, the COMA applied the good faith exception, even though the commander who had authorized the search arguably had no authority over the parking lot where the search was conducted.⁹⁴ In *Chapple*, the COMA applied the good faith exception even though the commander who authorized the search did not have any authority over the quarters where the search was conducted.⁹⁵

⁸⁴*Id.* at 4183.

⁸⁵*Id.* at 4184 (Stevens, J., dissenting), 4185 (Ginsburg, J., dissenting).

⁸⁶*Id.* at 4184 (Stevens, J., dissenting).

⁸⁷The majority found that the Arizona Supreme Court's decision was based on federal law. The majority relied on *Michigan v. Long*, 463 U.S. 1032 (1983), finding that when a state court decision appears to be based primarily on or interwoven with federal law, it will be presumed to be based on federal law, absent a clearly stated independent state law ground. *Id.* at 4181. Justice Ginsburg argued that *Long* should be overruled, and that, absent a plain statement to the contrary, a state court's decision should be presumed to rely on a state law ground. *Id.* at 4186 (Ginsburg, J., dissenting).

⁸⁸*United States v. Leon*, 468 U.S. at 897, 903 (1984).

⁸⁹*Evans*, 63 U.S.L.W. at 4180.

⁹⁰On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (1994) (to be codified at 10 U.S.C. § 941) changed the name of the United States Court of Military Appeals to the United States Court of Appeals for the Armed Forces. This note will use the title of the court that was in place when the decision was published.

⁹¹35 M.J. 283 (C.M.A. 1992).

⁹²36 M.J. 410 (C.M.A. 1993).

⁹³In *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992), the COMA held that the good faith exception applies to searches authorized by commanders.

⁹⁴The COMA held that the commander actually did have authority over the dining facility parking lot where the search was conducted, even though his battalion shared it with two other battalions. However, the COMA held that, in the alternative, the good faith exception applied, because the commander had probable cause to believe that he could authorize the search. *Mix*, 35 M.J. at 288.

⁹⁵The quarters were off-post quarters in Italy. Although a commander's search authority extends to his or her soldiers' off post-quarters overseas, the COMA found that the commander in *Chapple* had no authority over the quarters because he was not in the chain of command of either the accused or the other soldier living in the quarters. However, the COMA applied the good faith exception because the commander reasonably believed that he had authority to authorize the search. *Chapple*, 36 M.J. at 413-14.

The COMA's expansion of the good faith exception in *Mix* and *Chapple* went well beyond the original good faith exception the Supreme Court created in *Leon*.⁹⁶ The mistake in *Leon* involved the existence of probable cause; the mistakes in *Mix* and *Chapple* involved the commander's authority over the area searched. *Evans* suggests that the COMA's expansion of the good faith exception to this new factual situation is completely appropriate.

Evans also suggests that the Supreme Court may be willing to extend the good faith exception to areas in which there is no warrant at all. Although there was a warrant in *Evans*, the warrant was not in effect at the time *Evans* was apprehended. One of the primary justifications for requiring a valid warrant before the good faith exception can be applied is because a neutral and detached magistrate provides a "more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer."⁹⁷ This justification was absent in *Evans*. The neutral and detached magistrate who reviewed the warrant in *Evans* decided to quash it. This magistrate's decision did not safeguard the accused's rights, because the decision was never communicated to the police.⁹⁸

In the future, the good faith exception may be expanded to situations where no warrant was ever issued. For example, if the police believe in good faith that a warrant or authorization was issued, based on information from a court clerk, a judge advocate, or other nonpolice personnel, the subsequent search may be justified under the good faith exception, even though no warrant or authorization ever existed.

Practitioners must remember that the good faith exception has limits. *Evans* indicates that the exception will not apply if errors by police personnel led to the improper search. Furthermore, the exception will not apply if the police act in bad faith. As the Supreme Court pointed out in *Leon*, the good faith exception will not apply if the police deliberately or

recklessly provide false information to the magistrate, if the magistrate abandons his or her neutral and detached role by merely serving as a "rubber stamp" for the police, or if there is not a substantial basis for determining the existence of probable cause.⁹⁹

The good faith exception to the Exclusionary Rule is becoming increasingly important. The exception is beginning to overshadow the "general rule," which requires exclusion of evidence obtained in violation of the Fourth Amendment.¹⁰⁰ The police no longer need probable cause or a proper warrant or authorization before conducting a search or seizure. All that is required is information that is close enough to probable cause and permission to search that is close enough to a proper warrant or authorization to permit the police to act in "good faith." Major Masterton.

Justice—Justice, Evermore A Plea for an Independent Military Judiciary¹⁰¹

With Apologies to Edgar Allan Poe

Once upon an evening dreary, while I pondered weak and weary,
Over many a quaint and curious volume of forgotten Military lore,
While I nodded, nearly napping, suddenly there came a tapping,
As of someone gently rapping, rapping at my office door.
"Tis some counsel," I muttered, "tapping at my chamber door—
Only this and nothing more."

Deep into the darkness peering, long I stood there wondering, fearing,
Doubting, dreaming dreams we never dared to dream before,

⁹⁶ See Frederic L. Borch, *COMA Further Extends the Good-Faith Exception: United States v. Chapple*, ARMY LAW., July 1993, at 39.

⁹⁷ *United States v. Leon*, 468 U.S. at 897, 913-14 (1984).

⁹⁸ Arguably, the original decision by a justice of the peace to issue an arrest warrant provided the accused an adequate safeguard. *Evans*, 63 U.S.L.W. at 4180. However, the Supreme Court did not focus on this original warrant. Instead, the Court focused on who was responsible for the failure to communicate that the warrant had been quashed. *Id.* at 4182-83.

⁹⁹ *Leon*, 468 U.S. at 914-15.

¹⁰⁰ A more fundamental limitation on the Exclusionary Rule is currently being considered in Congress. The proposed Exclusionary Rule Reform Act would amend Title 18 of the United States Code by adding the following language:

Evidence obtained as a result of a search or seizure shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the Fourth Amendment to the Constitution of the United States, if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the fourth amendment. The fact that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of the existence of such circumstances.

H.R. 666, 104th Cong., 1st Sess. (1995).

¹⁰¹ Presented at the 1995 Judicial Conference of the United States Court of Appeals for the Armed Forces. This restates in vastly shorter form the content of Fredric Lederer & Barbara Hundley, *Needed: An Independent Military Judiciary: A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J., 629 (1994).

But the silence was unbroken, and the stillness gave no token,
and the only word there spoken was the whispered words,
"Ansell¹⁰² has awoken"
This I queried, muttering the puissant charm, "But
Crowder¹⁰³—evermore,"
Only to hear an echo murmured, "Ansell"—
Merely this and nothing more.

Open then I flung the shutter, when with many a cough and
flutter
In amid the wind's roar, stepped a stately law officer¹⁰⁴ of the
hallowed days of yore.
Not the least acknowledgment made he; not a minute stopped
or stayed he,
But with judicial mien, perched upon my desk
Seized a *Manual*, and nothing more.

Then this shade of long sought dignity, said,
With a grave and stern decorum of the countenance it wore,
"The time has come for jurists all, their stature tall to proclaim
in law."
I marveled at this cryptic note, and frowned, What meaning
might it bear?
"Soldiers, sailors, marines, and Coasties, men and women of
the air—
verily civilians too—might reasonably our neutral judgment
doubt"
he complained, albeit with care.
Yet, I said, "All this is sanctioned history and law."
Quoth Colonel Raven, "Nevermore"
Much I marveled this untimely visitor giving discourse so
plainly,

Thought its answer little meaning—little relevancy bore,
For we could not help agreeing that with *Mitchell*,¹⁰⁵ *Weiss*,¹⁰⁶
and *Graf*¹⁰⁷
(*Herandez*¹⁰⁸ when truly said)
No complaint could be so lodged at my office door
Quoth Colonel Raven, "*Mabe*¹⁰⁹ and Nevermore"

Colonel Raven sat beguiling all my sad soul into smiling
Straight I wheeled a cushioned seat in front of reporters, red
and khaki.
There, upon the leather sinking I betook myself to thinking.
In *Mabe* the Navy's Chief Trial Judge of too lenient sentences
warned—
lest he said, the military judiciary be harmed
In *Mitchell* the appellate court, concern admitted,
vanquished challenge via honor asserted and committed,
Navy Secretary's judicial purging only by TJAG¹¹⁰ narrowly
averted
Then *Weiss*,
Scalia and Thomas, strangely, sustaining military law
that would afoul of due process be if applied to life civilian¹¹¹
Quoth Colonel Raven, "Nevermore"

"Prophet!" said I, "Arbiter of evil?—prophet of law—or
devil?
Whether Tempter sent or tempest tossed thee here ashore,
Desolate, yet all undaunted on this final stable legal land
enchanted
On this home with precedent abounding—tell me truly, I
implore
Must we now with Congress ascendant—tell me—tell me I
implore

¹⁰² Acting The Judge Advocate General (TJAG) during World War I, Brigadier General Ansell was the first great reformer of military justice. Inasmuch as Professor Morgan, father of the Uniform Code of Military Justice, served as one of Ansell's staff officers, Ansell might be credited with at least inspiring the Uniform Code itself. General Ansell's ongoing dispute with Major General Crowder, TJAG and Provost Marshall General, ultimately led to Ansell's departure from active duty. See generally 1 FREDRIC I. LEDERER & FRANCIS A. GILLIGAN, COURT-MARTIAL PROCEDURE 12-13 (1991); THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, 114-15 (1975).

¹⁰³ Major General Crowder, principal author of the 1916 Articles of War, was a traditionalist very much in favor of command control of the military justice system. See *supra* note 102.

¹⁰⁴ The "judge" created by the Uniform Code of Military Justice when first enacted.

¹⁰⁵ *United States v. Mitchell*, 39 M.J. 131 (C.M.A. 1994).

¹⁰⁶ *Weiss v. United States*, 36 M.J. 224 (C.M.A. 1992), *aff'd*, 114 S. Ct. 752 (1994).

¹⁰⁷ *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992) (holding that due process did not require fixed tenure for military judges). The *Graf* issue reached the Supreme Court in the *Herandez* case which was decided along with *Weiss*.

¹⁰⁸ See *supra* note 107.

¹⁰⁹ *United States v. Mabe*, 30 M.J. 1254 (N.M.C.M.R. 1990) (en banc). In *Mabe*, Chief Trial Judge Garvin advised a circuit judge that he was "receiving grumblings from the Med regarding sentences" and asked the judge to reexamine his current stance to ensure that he was being fair and impartial and not defense oriented.

¹¹⁰ The Secretary of the Navy attempted, unsuccessfully, to have the Navy TJAG fire a Navy trial judge because of that judge's sentencing. 1 FRANCIS A. GILLIGAN & FREDRIC LEDERER, COURT-MARTIAL PROCEDURE § 14-10.00 (1991 & Supp. 1993).

¹¹¹ *Weiss*, 114 S. Ct. at 771 (Scalia & Thomas, JJ., concurring).

must we now the law bestir?
Can we not with more consequential matters deal, I implore?"
Quoth Colonel Raven, "Nevermore"

"Be that word our sign of parting, sir" I shrieked, upstarting—
"Get thee back into the tempest and the Night's Plutonian
shore
The issue's dead; leave no woe as your token that thy soul has
spoken
Leave our complacency unbroken—quit the office and my
door
Take thy gaze from out my heart and take thy plea from my
PC.
Of CD-Roms, and TV witness testimony remote; of annual
Manuals,
That is today—be no bore!
Enough!"
Quoth Colonel Raven, "Nevermore"

Colonel Raven, shade never flitting, still is sitting
on my desk near to my office door
Says he with visage ever piercing:
"Judicial Independence we must implore
with mid-career tenure as our floor
Can there justice be without belief?
Can those we judge in our findings find relief?
What of credible judicial oaths?
Will they our sentences believe or proxy lackeys see with
boasts?
What of *faith*—theirs and ours?"
"So," I said, with heart arising—
"We must the Uniform Code amend?
To establish justice actual—and perceptual
—of image pure, and credible"
And the heart light from him streaming, vanquishes his shad-
ow from the floor
and our judicial souls from out that shadow, that lies in history
alone
Shall be lifted—Evermore!

Fredric Lederer¹¹²

International and Operational Law Notes

Legal Training Handbook for the Ukrainian Military

Coinciding with President Clinton's May 1995 visit to
Ukraine, a first of its kind democracy building project

between The Judge Advocate General of Ukraine and United
States Army lawyers was completed in Kiev. Over the course
of this eight-month project, from September 1994 to May
1995, United States Army judge advocates from the Interna-
tional and Operational Law Division, Office of The Judge
Advocate General,¹¹³ worked directly with Colonel Alexander
Bokov, Chief, *Legal Service of the Ministry of Defense of
Ukraine* (the highest judge advocate position in the Ukrainian
military) in developing a handbook for Ukrainian soldiers
entitled, "Code of Conduct for Participants in Military Opera-
tions."¹¹⁴ This handbook now serves as the primary training
guide for instructing Ukrainian soldiers in the basics of law of
war, human rights, and professional ethics.

Although more expansive in content, the Ukrainian hand-
book is patterned after the very successful Peruvian Human
Rights handbook developed by Army lawyers for the Peruvian
armed forces in 1993.¹¹⁵ The Ukrainian handbook is pocket
sized, made of durable paper, and has been officially adopted
by the Ukrainian Ministry of Defense as the standard training
text for the Ukrainian armed forces.

Using a Ukrainian printing company, 100,000 copies of the
handbook were produced at a cost of approximately
\$25,000.¹¹⁶ Once the handbooks were printed, United States
judge advocates assisted in both training a cadre of Ukrainian
judge advocates to teach the subject matter of the handbook to
their soldiers and in developing a systematic plan as how best
to distribute the handbook.

The handbooks are now a part of the core instruction at
each major military training center, and a Ukrainian judge
advocate conducts this training for all soldiers who have more
than six months of active service remaining on their enlist-
ments. United States Army judge advocates observed the first
such training session from 18 to 22 April 1995, at the Ukrain-
ian city of Lviv, the training center for the Western sector of
Ukraine.

As with all initiatives undertaken to assist the militaries of
emerging democracies, the success of the United States effort
to assist in institutionalizing the law of war and human rights
training in the Ukrainian armed forces must be tempered by
the fact that this training can be effective only to the degree
that it is fully embraced by the military. With a standardized
training handbook that is truly its own, a legal department
trained to teach law of war and human rights, and an armed
force that regularly receives such training, the Ukrainian

¹¹²Chancellor Professor of Law Marshall-Wythe School of Law & Director, Courtroom 21, College of William & Mary in Virginia; Colonel, JA (USAR).

¹¹³Colonel Ihor Kotlarchuk (JAGC, USAR) was instrumental in assisting on this project.

¹¹⁴Copies of the handbook and detailed after action reports are on file at the Center for Law and Military Operations, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

¹¹⁵See Jeffrey F. Addicott & Andrew M. Warner, *JAG-Corps Poised for New Defense Missions: Human Rights Training in Peru*, *ARMY LAWYER*, Feb. 1993, at 78.

¹¹⁶Funding was provided under 22 U.S.C. § 5901, popularly known as "Nunn Lugar" funds.

armed forces now have a solid methodology for continuing this effort. In this regard, the strategy throughout this project was to establish and maintain the United States role as one of a "helper." The success of the Ukrainian military in the coming years will be due exclusively to its commitment to continue to teach and train its soldiers in these critical areas of the law. Lieutenant Colonel Jeffrey Addicott, International and Operational Law Division, OTJAG.

Consequences of Violating the Posse Comitatus Act

The following two notes deal with the consequences of violating the Posse Comitatus Act¹¹⁷ (PCA). Although a criminal statute, no one has ever been prosecuted for violating the PCA. However, both criminal and civil consequences may flow from conduct that courts view as violating the PCA. In the criminal context, defendants have attempted to invoke the Exclusionary Rule, alleging that the involvement of military personnel triggered a PCA violation, which required the evidence to be excluded. The first note examines the cases in which defendants have made this claim, while the second note explores cases in which plaintiffs have brought civil claims against military personnel based on an alleged PCA violation. Both notes caution that, while courts rarely have ruled in favor of the civilian claimant in either situation, judge advocates should be aware of these potential adverse consequences. Lieutenant Commander Winthrop.

The Exclusionary Rule's Applicability to Violations of the Posse Comitatus Act

Introduction

With increasing frequency, criminal defendants rely on the PCA in an attempt to suppress evidence. In the typical case, military personnel are involved with civilian law enforcement authorities in the fight against drugs. As a result of these operations, illegal drugs are seized and civilians are brought to trial in federal or state criminal courts. At trial, the defendants allege that, under the Exclusionary Rule,¹¹⁸ the evidence should be suppressed because it was obtained in violation of the PCA.

¹¹⁷U.S.C. § 1385.

¹¹⁸The Exclusionary Rule is a judicially created remedy designed to deter "unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra*, 414 U.S. 338, 347 (1974); *see also Mapp v. Ohio*, 367 U.S. 643 (1961).

¹¹⁹*United States v. Banks*, 539 F.2d 14, 16 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976); *see also H.R. REP. NO. 97-71*, pt. II, 97th Cong., 1st Sess. 3 (1981), *reprinted in 1981 U.S.C.C.A.N. 1781, 1785* [hereinafter *H.R. REP. NO. 97-71*].

¹²⁰The phrase "posse comitatus" is literally translated from the Latin as the "power of the county." It is defined at common law to refer to all those over the age of 15 on whom a sheriff could call for assistance in preventing any type of civil disorder. *H.R. REP. NO. 97-71*, *supra* note 119, at 1786 (citing 1 W. BLACKSTONE, COMMENTARIES 343-44).

¹²¹18 U.S.C. § 1385.

¹²²*See* 10 U.S.C. §§ 371-378.

¹²³*See H.R. REP. NO. 97-71*, *supra* note 119, at 1785.

Although defendants rarely are successful when invoking the PCA, the PCA continues to be a focal point of litigation whenever the military assists civilian law enforcement authorities to combat illegal drugs. Accordingly, this note will: provide a brief overview of the PCA; examine the key federal and state court cases that have addressed the applicability of the Exclusionary Rule to PCA violations; and address the reasons that some courts view the Exclusionary Rule as an inappropriate remedy for PCA violations.

Overview of the Posse Comitatus Act

The PCA, originally enacted shortly after the Civil War, was intended to "eliminate the direct active use of Federal troops by civil law authorities" to enforce civil laws.¹¹⁹ The PCA provides, in its entirety, as follows:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus¹²⁰ or otherwise to execute the laws shall be fined or imprisoned not more than two years, or both.¹²¹

The PCA reflects a national policy to limit the role of the military in civilian life. Nevertheless, Congress has recognized that in some areas of civilian life the military—because of its expertise and specialized equipment—can, and should be, of great assistance to civilian law enforcement authorities. One of these areas involves the fight against illegal drugs.

In 1981, in an effort to further combat drug smuggling into the United States, Congress enacted statutes designed to clarify and liberalize the PCA's restrictions.¹²² Pursuant to these provisions, "Congress intended to maximize the degree of cooperation between the military and civilian law enforcement to stem the influx of illegal drugs into the country, while also recognizing the need to maintain the traditional balance of authority between civilians and the military."¹²³

The DOD implements these statutes through DOD Instruction 5525.5.¹²⁴ Pursuant to DOD Instruction 5525.5, the military may provide direct assistance to civilian law enforcement authorities if the actions "are taken for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities."¹²⁵ The Military Purpose Doctrine provides the authority for military personnel acting as undercover agents in off-post drug investigations where civilians are either the source of drugs being introduced to the post or are suspected of being involved in drug transactions with service members.¹²⁶

With the liberalization of the restrictions of the PCA, the military has become actively involved in the area of counter-drug support operations. Consequently, civilian law enforcement authorities have been able to seize more illegal drugs and bring the responsible individuals to trial. It is at this point that the PCA becomes the focal point of litigation at the ensuing trial.

Federal Court Decisions

As a threshold matter, for a suppression motion to be successful, the defense must first establish that a PCA violation has occurred. After examining the reported cases in this area, one can see that the federal courts are extremely reluctant to find that PCA violations have occurred.¹²⁷

Nevertheless, most courts have concluded that even if a PCA violation has occurred, the Exclusionary Rule would be inappropriate. In reaching this conclusion, the courts have relied primarily on the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) decision of *United States v. Walden*.¹²⁸

In *Walden*, Mr. and Mrs. Walden were convicted of federal firearms violations for selling firearms to minors and nonresidents from a department store in Quantico, Virginia, near the Marine Corps base. Three Marines and a Treasury Department agent (Alcohol, Tobacco and Firearms Division) conducted an undercover investigation that led to the arrest and conviction of the Waldens.¹²⁹

The issue before the Fourth Circuit was whether a PCA violation existed and, if so, whether the Exclusionary Rule should be applied to the evidence obtained by the Marines. The Fourth Circuit ruled that technically the PCA was not violated because the PCA did not extend to the Marines.¹³⁰ However, the Fourth Circuit noted that Secretary of Navy Instruction 5400.12 (Navy Instruction) extended the PCA restrictions to the Navy and Marines. The Fourth Circuit found that the Navy Instruction had been violated, but refused to apply the Exclusionary Rule. The Fourth Circuit reasoned that the Exclusionary Rule should not be applied because this was a case of first impression.¹³¹

¹²⁴Department of Defense Instruction 5525.5 was published in the Code of Federal Regulations at 32 C.F.R. part 213. On April 28, 1993, the DOD removed part 213 from the Code of Federal Regulations stating that it had "served the purpose for which [it] was intended and [is] no longer valid." See 58 Fed. Reg. 25,776 (1993). Department of Defense Instruction 5525.5 still is in effect.

¹²⁵See DOD Instruction 5525.5, encl. 4, ¶ A 2a (1986). This is known as the Military Purpose Doctrine. See also DEP'T OF ARMY, ARMY REG. 500-51, EMERGENCY EMPLOYMENT OF ARMY AND OTHER RESOURCES: SUPPORT TO CIVILIAN LAW ENFORCEMENT, para. 3-4a (1 Aug. 1983).

¹²⁶Memorandum, DOD Inspector General to Service Secretaries, subject: Criminal Investigations Policy Memorandum Number 5—Criminal Drug Investigative Activities (1 Oct. 1987).

¹²⁷See *Hayes v. Hawes*, 921 F.2d 100, 103 (7th Cir. 1990) (court noted the "magnitude of military involvement needed" before a PCA violation will be found, and summarized several cases where no PCA violation was found); *United States v. Hartley*, 796 F.2d 112, 114 (5th Cir. 1986) (court noted that the military involvement in the investigation must be "pervasive" to constitute a PCA violation); *United States v. Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988) (court concluded that because the military participation in the investigation "did not pervade the activities of civilian officials, and did not subject the citizenry to the regulatory exercise of military power," it did not violate the PCA).

Moreover, the courts have developed three separate tests to determine whether the use of military personnel violates the PCA. See *United States v. Hartley*, 678 F.2d 961, 978 n.24 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) (tests for determining PCA violations are as follows: (1) whether civilian law enforcement officials made a "direct active use" of military investigators to "execute the laws;" (2) whether the use of the military "pervaded the activities" of the civilian officials; or (3) whether the military was used so as to subject "citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature.").

¹²⁸490 F.2d 372 (4th Cir.), cert. denied, 416 U.S. 983 (1974).

¹²⁹*Walden* was decided before Congress liberalized the restrictions of the PCA in 1981.

¹³⁰Most courts interpreting the PCA have refused to extend its terms to the Navy and Marine Corps. See *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); *United States v. Roberts*, 779 F.2d 565 (9th Cir.), cert. denied, 479 U.S. 839 (1986).

¹³¹Specifically, the Fourth Circuit noted that this was the first time that it had been made aware that "military personnel have been used as the principal investigators of civilian crimes in violation of the Instruction." *Walden*, 490 F.2d at 377.

Notwithstanding its holding, the Fourth Circuit was concerned about the military's participation in civilian law enforcement and issued the following warning:

[W]e therefore decline to reverse defendants' convictions or to impose the extraordinary remedy of an exclusionary rule *at this time*. Should there be evidence of wide-spread or repeated violations in any future case . . . we will consider ourselves free to consider whether adoption of an exclusionary rule is required as a future deterrent.¹³²

The language of *Walden*, requiring a widespread or repeated violation before invoking the Exclusionary Rule, has been repeatedly relied on by federal courts confronting this issue.

For example, in 1979, the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) had the opportunity to address the applicability of the Exclusionary Rule to PCA violations in *United States v. Wolffs*.¹³³ In *Wolffs*, the Fifth Circuit declined to decide the "complex and difficult issue" of whether the CID's involvement in an undercover drug purchase violated the PCA.¹³⁴ Instead, the Fifth Circuit deter-

mined that even if a PCA violation had occurred, applying the Exclusionary Rule was unwarranted. The Fifth Circuit, citing *Walden*, ruled that if "confronted in the future with widespread and repeated violations of the PCA an exclusionary rule can be fashioned at that time."¹³⁵ The United States Courts of Appeals for the Seventh,¹³⁶ Ninth,¹³⁷ and Eleventh¹³⁸ Circuits reached the same conclusion.

Federal courts, relying on *Walden* and *Wolffs*, have uniformly declined to apply the Exclusionary Rule to violations of the PCA. The federal courts have noted the lack of widespread or repeated violations necessary to invoke the Exclusionary Rule as a deterrent. Furthermore, no reported federal court cases exist where the Exclusionary Rule was used to suppress evidence as a result of a PCA violation.¹³⁹

State Court Decisions

The courts have reached a different decision at the state level. There are three reported state court decisions where the Exclusionary Rule was applied as a result of a PCA violation. Two of these decisions, *People v. Tyler*¹⁴⁰ and *People v. Burden*¹⁴¹, however, were reversed on appeal. Accordingly, the only valid state court decision on point is *Taylor v. State*.¹⁴²

¹³²*Id.* In 1987, 13 years after *Walden*, the Fourth Circuit was provided another opportunity to address the applicability of the Exclusionary Rule to PCA violations in *United States v. Griley*, 814 F.2d 967 (4th Cir. 1987). In *Griley*, the Fourth Circuit determined that no PCA violation occurred where the Army's Criminal Investigation Division (CID) worked with the Federal Bureau of Investigation in investigating the theft of five M-16s. This investigation ultimately led to the search of a civilian's (Griley) home. The Fourth Circuit stated that the "case did not call for the reopening of what we described in *Walden*." *Id.*, at 976. Basically, from the Fourth Circuit's remarks, because there had not been widespread or repeated violations of the PCA over the years, the Fourth Circuit believes that there is no need to apply the exclusionary rule as a deterrent.

¹³³ 594 F.2d 77 (5th Cir. 1979).

¹³⁴ *Id.* at 85.

¹³⁵ *Id.* See also *United States v. Hartley*, 796 F.2d 112, 115 (5th Cir. 1986) (relying on *Wolffs*, the Fifth Circuit rejected defendant's contention that a PCA violation warrants application of the Exclusionary Rule).

¹³⁶ See *Hayes v. Hawes*, 921 F.2d 100 (7th Cir. 1990) (although the Seventh Circuit found no PCA violation, it nevertheless noted that there had been no widespread or repeated violations necessary to invoke the Exclusionary Rule (citing *Walden* and *Wolffs*)).

¹³⁷ See *United States v. Roberts*, 779 F.2d 565, 568 (9th Cir.), *cert. denied*, 479 U.S. 839 (1986) (the Ninth Circuit found a PCA violation, but adopted the approach of *Walden* and *Wolffs* and held that an exclusionary rule should not be applied to violations of 10 U.S.C. §§ 371-378 until a need to deter future violations is demonstrated).

¹³⁸ See *United States v. Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988) (although the Eleventh Circuit found no PCA violation, it nevertheless noted that there had been no repeated instance of violations that would require or even justify the application of the Exclusionary Rule (citing *Walden*)); *United States v. Hartley*, 678 F.2d 961, 978 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) (Eleventh Circuit agreed with district court's rulings that no PCA violation occurred and, even if a violation existed, the exclusionary rule was not an appropriate remedy (citing *Wolffs*)); see also *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1478 n.9 (11th Cir. 1992) (relying on *Wolffs*, the Eleventh Circuit noted that the exclusionary rule is not appropriate until such time as widespread and repeated violations of the PCA demonstrate a need for such sanction).

¹³⁹ *But see United States v. Banks*, 383 F. Supp. 368 (1974) (where element of offense requires that law enforcement officials be "lawfully engaged," a PCA violation would negate that element).

¹⁴⁰ 854 P.2d 1366 (Colo. App. 1993), *reversed*, 874 P.2d 1037 (Colo. 1994).

¹⁴¹ 288 N.W.2d 392 (Mich. App. 1979), *reversed*, 303 N.W.2d 444 (Mich. 1981).

¹⁴² 645 P.2d 522 (Okla. Ct. App. 1982).

In *Taylor*, a military police officer, Mainard, was investigating two enlisted men's participation in drug trafficking. Mainard requested the assistance of the Lawton, Oklahoma, Police Department when his investigation led to an off-post source. Mainard, working undercover with the Lawton Police, purchased drugs from Taylor. During Taylor's arrest, Mainard pulled his gun and participated in the subsequent search of Taylor's house.

The Oklahoma Court of Appeals had little difficulty in finding that Mainard's participation in this case violated the PCA. The court noted that there was no *per se* Exclusionary Rule for violations of the PCA. Instead, the court indicated that it would examine each case to determine whether the illegal conduct by the military "rises to an intolerable level as to necessitate an exclusion of the evidence resulting from the tainted arrest."¹⁴³ The court concluded that the military intervention in the case was excessive and could not be condoned. Thus, the court ruled that it was necessary to suppress the evidence.

In *People v. Tyler*, the Colorado Court of Appeals held that the PCA was violated because the prosecution failed to present enough evidence to establish a military purpose for the conduct of the CID agents in the case. Although the court noted that a PCA violation does not automatically trigger the exclusionary rule, it appeared to apply it automatically to the case merely because the PCA was violated.

On appeal, the Supreme Court of Colorado reversed the case on other grounds. The court did not address the lower court's holding that the CID agents' conduct violated the PCA and that such violation required suppression of the evidence. However, the court noted that the record "casts doubt upon the implicit conclusion of the court of appeals that the conduct of the CID did not primarily further a military purpose."¹⁴⁴

In *People v. Burden*, an Air Force Airman agreed to assist the Michigan State Police in a drug investigation. In exchange for his participation, the Airman would have criminal charges pending against him by the civilian authorities

dropped. The trial court and the court of appeals determined that the PCA was violated and excluded the Airman's testimony at trial. The court of appeals concluded that because violators of the PCA were never prosecuted, the Exclusionary Rule was the only real sanction remaining to dissuade people from violating the PCA.

On appeal, the Supreme Court of Michigan held that there was no violation of the PCA. The court reasoned that the Airman was acting in his personal capacity, unrelated to his status as a military man.¹⁴⁵ The court reversed the decision without discussing the lower courts' use of the Exclusionary Rule in the case.

The Appropriateness of the Exclusionary Rule to PCA Violations

In *State v. Danko*¹⁴⁶ the court found a technical violation of the PCA where a military policeman, on joint patrol with a city policeman, helped with the search of a car. The Supreme Court of Kansas found the rationale of *Walden* persuasive and declined to apply the Exclusionary Rule. However, the main reason for its ruling was that, in a case involving PCA violations, it did not find present "the same considerations which required an exclusionary rule in Fourth Amendment cases."¹⁴⁷

Several other courts also have questioned the appropriateness of the Exclusionary Rule to PCA violations. Some courts have reasoned that the PCA identifies criminal penalties for outrageous violations and thus, there is no need for an Exclusionary Rule as a deterrent.¹⁴⁸ Other courts have noted that the potential abuses of the PCA are "not of the same magnitude, neither qualitatively nor quantitatively, as violations under the Fourth Amendment."¹⁴⁹

However, these views are in the minority. The majority of courts accept the reasoning of *Walden* and *Wolffs* that, if widespread or repeated violations of the PCA exist, the Exclusionary Rule may be used to deter illegal conduct.

¹⁴³*Id.* at 524.

¹⁴⁴*Taylor*, 874 P.2d at 1040 n.5.

¹⁴⁵*Burden*, 303 N.W.2d at 447.

¹⁴⁶548 P.2d 819 (Kan. 1976).

¹⁴⁷*Id.* at 825.

¹⁴⁸See *State v. Valdobinos*, 858 P.2d 199, 204 (Wash. 1993); *State v. Roberts*, 786 P.2d 630, 635 (Kan. App. 1990); *Moon v. State*, 785 P.2d 45, 48 (Alaska App. 1990).

¹⁴⁹See *Taylor v. State*, 645 P.2d 522, 524 (Okla. Ct. App. 1982); *United States v. Thompson*, 33 M.J. 218, 221 (C.M.A. 1991) (in discussing the PCA and the exclusionary rule, the court stated that "invocation of the exclusionary rule for Fourth Amendment violations does not necessarily imply that a statutory or regulatory violation requires similar treatment"); but see *Bissonette v. Haig*, 800 F.2d 812 (8th Cir. 1986) (court reasoned that a seizure in violation of the PCA was "unreasonable" within the meaning of the Fourth Amendment for purposes of a *Bivens* constitutional-tort action).

Conclusion

As the case law demonstrates, courts rarely take the drastic remedy of excluding evidence for PCA violations. Nevertheless, given the sheer number of reported cases,¹⁵⁰ criminal defendants will continue to raise this issue whenever the military assists civilian law enforcement authorities in counter-drug support operations.

Because of the military's continuing role in counter-drug operations, judge advocates must continue to provide advice to all soldiers on PCA limitations. Avoiding a violation of the PCA in the first instance will ensure that the Exclusionary Rule will not be a serious consideration at the trial. Major Saviano, Student, 43d Graduate Class.

Civil Liability Under the Posse Comitatus Act

Introduction

The PCA initially was enacted to prohibit the use of federal forces to police elections in the former Confederate states. The statute criminalizes the improper use of the Army and Air Force to enforce civilian law and order. Most observers view the act as a pure statute. The consequences of an alleged violation, however, could transcend criminal sanctions. This note traces the circumstances in which an alleged violation of the PCA could give rise to civil liability.

Does the PCA Create a Private Right of Action?

The PCA's text is a rare example of congressional clarity. The act simply states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise execute the laws shall be fined or imprisoned not more than two years, or both.¹⁵¹

The potential criminal sanctions for violating the statute are obvious. The question not settled by the express terms of the statute, however, is whether the PCA creates a private right act for a victim of a violation. Despite the dearth of reported

cases on this issue, the answer to this question appears to be settled.

In *Lamont v. Haig*,¹⁵² residents of Wounded Knee, South Dakota, sued several active duty soldiers under a variety of theories. The suit stemmed from the Indian occupation of Wounded Knee in 1973. The plaintiffs alleged that they were involuntarily confined to their homes by federal law enforcement officials. The plaintiffs' chief complaint was that the significant use of military personnel in support of the civilian law enforcement activity violated an "implied right . . . to be free from the use of the military to enforce civil laws."¹⁵³

The plaintiffs claimed they were entitled to sue for damages for violation of the PCA. The plaintiffs also alleged that the defendants' conduct violated a myriad of constitutional provisions. The individual defendants were those who allegedly directed the use of military personnel.

In a well reasoned opinion, the court ruled that the PCA did not create a private right of action. The court determined that the act was "in fact [a] bare criminal statute . . . showing not the slightest indication of any legislative intent to create a private right of action."¹⁵⁴ The court dismissed the claims under the PCA but permitted the action to go forward on plaintiffs' constitutional claims.

The United States Court of appeals for the Second Circuit (Second Circuit) recently reached the same conclusion in *Robinson v. Overseas Military Sales Corp.*¹⁵⁵ In *Robinson*, the plaintiff was an independent sales agent who sold cars for Chrysler at military exchanges in Korea. After the plaintiff was investigated for criminal misconduct, he was barred from post. The plaintiff filed suit against his employer and three active duty law enforcement investigators in their official and individual capacities. Among several allegations, the plaintiff claimed that the military defendants violated the PCA. The Second Circuit summarily dismissed the claims under the PCA, finding that the statute did not create any private cause of action.

Why Not Stop Here?

If the PCA does not create a private right of action, as *Lamont* and *Robinson* suggest, how could a service member be subject to civil liability for violating the statute? Unfortunately, the inquiry does not end with the conclusion that the PCA does not create a private right of action. A plaintiff still may

¹⁵⁰Since the 1981 amendments to the PCA, there have been well over 50 reported cases (federal and state court level) that have addressed PCA violation issues.

¹⁵¹18 U.S.C. § 1835.

¹⁵²539 F. Supp. 552 (W.D.S.D. 1982).

¹⁵³*Id.* at 554.

¹⁵⁴*Id.* at 558.

¹⁵⁵21 F.3d 502 (2d Cir. 1994).

be able to use an alleged violation of the statute to form the basis of a constitutional tort suit against an individual defendant. In effect, a plaintiff can accomplish indirectly what he or she cannot do directly. Consequently, the determination that the PCA does not create a private cause of action is of little consequence.

The So-Called "Bivens" Suit

An understanding of potential civil liability requires some discussion of "constitutional torts." The genesis of the constitutional tort as a theory of recovery rests in the United States Supreme Court's decision in *Bivens v. Six Unknown Named Agents*.¹⁵⁶ In *Bivens*, the Supreme Court held that a federal official can be individually liable for money damages if he personally violated a constitutional right.¹⁵⁷

Over the years, the Supreme Court has expanded the holding in *Bivens*. *Harlow v. Fitzgerald*¹⁵⁸ ultimately established the controlling standard. A "Bivens" action may lie not only for an alleged violation of a constitutional right, but also for an alleged violation of a statutory right. Government officials (and therefore, service members) "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹⁵⁹ Whether a defendant official can be held liable will turn on the "objective legal reasonableness" of the challenged action.¹⁶⁰

The *Harlow* standard is a form of qualified immunity. The immunity extended is the result of a delicate balance between two competing interests—an individual's right of redress for harm caused by a government official and the concern that government officials will be inhibited from performing their duties for fear of being sued.¹⁶¹

In later decisions, the Supreme Court further refined the standard enunciated in *Harlow*. The refinements have expanded the reach of the immunity defense. For qualified immunity to have any utility, the "right" at issue must be particularized. As the Court has noted

[t]he contours of the right must be sufficiently clear that a reasonable official would

¹⁵⁶403 U.S. 388 (1971).

¹⁵⁷In *Bivens*, the constitutional right at issue was the plaintiff's Fourth Amendment right to be free from an unreasonable search and seizure.

¹⁵⁸457 U.S. 800 (1981).

¹⁵⁹*Id.* at 818.

¹⁶⁰*Id.* at 819.

¹⁶¹*Id.* at 814.

¹⁶²*Anderson v. Creighton*, 107 S. Ct. 3034, 3039 (1987) (citations omitted).

¹⁶³800 F.2d 812 (8th Cir. 1986), *aff'd*, 485 U.S. 264 (1988).

¹⁶⁴The Department of Justice (DOJ) represented the individual defendants.

¹⁶⁵See *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985).

understand that what he is doing violates that right. This is not to say that a official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.¹⁶²

Bivens and the PCA

Given its law enforcement focus, violation of the PCA inevitably will encroach on a constitutionally protected interest (e.g., deprivation of liberty, right to privacy, and the right to be free from unreasonable search and seizure). Therefore, virtually any alleged violation of the PCA could be separately pleaded as a *Bivens* claim against an individual actor. A *Bivens* suit is the means by which a plaintiff can circumvent that the PCA does not create a private right of action.

This precise situation occurred in *Bissonette v. Haig*,¹⁶³ a case related to *Lamont v. Haig*. Following the district court's decision in *Lamont v. Haig*, the plaintiffs filed an amended complaint. The United States Court of Appeals for the Eighth Circuit's en banc opinion in *Bissonette* arose from the district court's dismissal of the amended complaint.

The principal dispute in *Bissonette* was the plaintiffs' contention that the military defendants unlawfully restricted the plaintiffs within an "armed perimeter." The plaintiffs argued that the use of military force violated the PCA. Because the use of military force violated the statute, the plaintiffs maintained that the restriction amounted to an "unreasonable" seizure within the meaning of the Fourth Amendment.¹⁶⁴

On the initial appeal from the district court's order dismissing the amended complaint, a circuit panel found that a seizure that violated the PCA was "unreasonable" within the meaning of the Fourth Amendment.¹⁶⁵ Thus, according to the panel, if a determination were made that a particular seizure violated the PCA, it would be a per se violation of the Fourth

Amendment. The qualified immunity defense would be easily overcome and the responsible federal officials would be liable for the violation.

Dissatisfied with the panel opinion, the individual defendants (through the DOJ) sought and obtained en banc review. A closely split circuit (five to four) agreed with the panel and concluded that a violation of the PCA would make the seizure "unreasonable" within the meaning of the Fourth Amendment.¹⁶⁶ The Eighth Circuit remanded the case to the district court to determine whether the PCA was violated.

The strongly worded dissent underscores the fallacy of the majority opinion.¹⁶⁷ The dissent's position, that violation of the statute should be a *factor* to consider in assessing whether the defendant's conduct was unreasonable within the meaning of the Fourth Amendment (as opposed to the majority's *per se* rule), is more plausible. As the dissent notes, unlike many criminal statutes, a violation of the PCA does not necessarily mean that the challenged conduct is "wrong and socially indefensible."¹⁶⁸ As in the Wounded Knee incident, the challenged conduct could be entirely defensible.

While the en banc decision in *Bissonette* was a blow to the individual military defendants involved, its impact on prospective defendants is limited. Undoubtedly, most courts will strain hard to *not* find a violation of the PCA. Moreover, even if a violation of the statute were found, a *per se* finding of liability would be improper. Assuming that the defense has been raised properly, a court still must evaluate the case in the context of the qualified immunity defense.

The Qualified Immunity Defense Put to the Test

Although there are few reported cases that address civil liability under the PCA,¹⁶⁹ one recent circuit court opinion illustrates the breadth of the qualified immunity defense. The decision of the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) in *Applewhite v. United States Air Force*¹⁷⁰ should serve as persuasive authority for service members defending *Bivens* actions for alleged violations of the PCA.

Applewhite involved an undercover drug "sting" operation conducted by Air Force Office of Special Investigations (OSI) personnel assigned to Kirtland Air Force Base, Albuquerque, New Mexico. The sting operation took place in an off-base apartment in Albuquerque. As a result of the operation, OSI agents arrested an airman who attempted to purchase drugs from an undercover agent. The airman's civilian wife also was present. After the airman's arrest, the OSI agents conducted a pat-down search on the wife which revealed drug paraphernalia on her and drugs in her purse.

The OSI agents took both the airman and the wife to Kirtland Air Force Base. At the base, the wife was partially strip searched and questioned. After two to three hours of questioning, an OSI agent called the Albuquerque Police Department. When the Albuquerque police declined to take over the investigation of the wife, the OSI released her. The wife ultimately filed a *Bivens* action against the OSI agents alleging violations of the PCA as well as the Fourth and Fifth Amendments.

The OSI agents moved for summary judgment relying on the defense of qualified immunity. The district court denied the motion after concluding that

military law enforcement officers generally know that it is clearly established law that they have absolutely no authority to go outside the confines of a military installation and arrest a civilian, transport her to a military installation, detain and strip search her.¹⁷¹

The officers filed an immediate appeal pursuant to 28 U.S.C. § 1291.¹⁷² On appeal, the Tenth Circuit applied the qualified immunity standards enunciated in *Harlow v. Fitzgerald* and *Anderson v. Creighton*. Additionally, the Tenth Circuit relied on more recent Supreme Court guidance on the scope of the qualified immunity defense:

The qualified immunity standard "gives ample room for mistaken judgments" by

¹⁶⁶ *Bissonette*, 800 F.2d at 813.

¹⁶⁷ *See id.* at 817.

¹⁶⁸ *Id.*

¹⁶⁹ Most reported cases citing the PCA involve efforts by criminal defendants to suppress evidence allegedly seized in violation of the statute. See Timothy J. Saviano, *The Exclusionary Rule's Applicability to Violations of the Posse Comitatus Act*, ARMY LAW., July 1995, at 61.

¹⁷⁰ 995 F.2d 997 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1292 (1994).

¹⁷¹ *Id.* at 1000 (quoting the district court order).

¹⁷² The DOJ represented the officers.

protecting "all but the plainly incompetent or those who knowingly violate the law. . . ." This accommodation for reasonable error exists because "officials should not err always on the side of caution" because they fear being sued.¹⁷³

The Tenth Circuit analyzed the conduct of the OSI agents and found it reasonable for the OSI agents to regard the wife as a participant in the drug buy and "to remove her *somewhere* while the Albuquerque Police were contacted[.]"¹⁷⁴ The Tenth Circuit determined that the partial strip search also was justified because it was the "product of a particularized, reasonable suspicion."¹⁷⁵ The Tenth Circuit concluded by finding that:

Since there was an independent military purpose to OSI's conduct, there was necessarily no wilful use of any part of the Air Force as a posse to execute civilian laws, nor did military law enforcement officers go outside the confines of a military installation to arrest a civilian as the Court below viewed it. The agents went off base to "sting" military personnel, not civilians. Mrs. Applewhite's husband, not the military, was responsible for the involvement of the civilian wife. This being established . . . , there was no violation by the OSI agents of any "clearly established statutory rights" of Mrs. Applewhite.¹⁷⁶

The court directed the district court to grant summary judgement to the individual defendants on the grounds of qualified immunity.

Applewhite illustrates how far at least one court will go to find qualified immunity.¹⁷⁷ From the OSI agents' perspective, the facts were not favorable—the wife was handcuffed, transported to the air base, questioned, strip searched, and detained for two to three hours *before* the Albuquerque police were called. Yet, by applying the very deferential qualified immunity standard, the Tenth Circuit was able to reach a reasoned conclusion. The result was that three service members were exonerated for what many would describe as inappropriate conduct.

¹⁷³ *Applewhite*, 995 F.2d at 1000 (quoting *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991)).

¹⁷⁴ *Id.* at 1000-01.

¹⁷⁵ *Id.* at 1001.

¹⁷⁶ *Id.*

¹⁷⁷ Admittedly, because the plaintiff was an accomplice to the drug transaction, she was not a sympathetic figure. What impact, if any, that this had on the Tenth Circuit's opinion is unknown.

¹⁷⁸ 50 U.S.C. App. § 521 (1988).

Conclusion

The military will continue to be called on to play a role in a variety of domestic operations. Military lawyers need to ensure that service members understand the line drawn by the PCA. Given our litigious society, a violation of the PCA is more likely to result in a lawsuit than a criminal prosecution. Service members must understand that a PCA violation could lead to individual monetary liability. If *Applewhite* is an indication of how courts will evaluate *Bivens* suits against service members, individual liability will be a rare event. Major O'Brien, Student, 43d Graduate Class.

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and legal assistance programs. You may adapt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. As always, we welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781. Attorneys interested in attending the 37th Legal Assistance Course in October 1995 should consult the CLE News section of this publication for information on obtaining quotas.

Soldiers' and Sailors' Civil Relief Act Note

Stays of Judicial Proceedings

A number of recent court decisions revisit several issues surrounding the invocation of the Soldiers' and Sailors' Civil Relief Act (SSCRA) "stay" provision. The first case bodes well for the service member invoking the protection. The second case displays how new technology may limit the ability of the service person to invoke the protection.

The SSCRA "stay" provision (§ 521) allows the service member—or anyone on the behalf of the service member—to request a stay of any stage of a civil proceeding.¹⁷⁸ The only limit on the service member's ability to invoke the stay is if the court finds that military service does not materially affect the ability of the service member to conduct the defense or

prosecution of the case.¹⁷⁹ Neither the plain text of the statute nor early court decisions made it clear who had the burden of proving the negative proposition stated in the code section. However, in *Boone v. Lightner*, the United States Supreme Court ruled that the trial court has discretion in allocating the burden of proof.¹⁸⁰ In practice, courts usually require a combination of a military reason for not attending the court session, coupled with a measurable impact on the service member's case resulting from the service member's absence.¹⁸¹

One significant problem attendant to requesting a stay has been the interplay between the stay provisions and other procedural rights of the service member. Judge advocates have been concerned for a number of years that requesting a stay under § 521 may inadvertently constitute an appearance that prevents a client from reopening a default judgment under § 520(4) of the SSCRA.¹⁸² Moreover, some courts have held that an invocation of the SSCRA stay provision operates as a waiver of any contest over personal jurisdiction.¹⁸³ The newest (unfortunately unpublished) case tends to put some of those concerns to rest.

In *Calhoun v. Rookstool*,¹⁸⁴ the Minnesota Court of Appeals rejected an automatic link between a request for a stay and waiver of the special defense challenging personal

jurisdiction. The case involved extensive litigation regarding personal jurisdiction over a service member under the Uniform Child Custody Jurisdiction Act.¹⁸⁵ The appellant was apparently a member of the armed services. In the appellate pleading, the petitioner apparently asserted that because the appellant had invoked the SSCRA "stay" provision, the appellant had "ironically" consented to jurisdiction.¹⁸⁶ The court rejected this automatic link.¹⁸⁷ Therefore, at least in Minnesota, a service member may request protection under the stay provision without inadvertently consenting to personal jurisdiction of the courts. Judge advocates should still ensure that any correspondence with the court includes a reservation of all defenses, including special defenses, such as personal jurisdiction.¹⁸⁸

The second case displays the changing nature of the courts and an interplay between these changes and the issue of material effect on a service member's case. In *Massey v. Kim*, the Georgia Court of Appeals held that the service member was not entitled to a stay of proceedings because he had not shown that his ability to conduct discovery was materially affected by his assignment overseas.¹⁸⁹

This case involved a soldier plaintiff. The soldier requested a stay from the court-imposed discovery deadline.¹⁹⁰ The sol-

¹⁷⁹"[A]ny action or proceeding . . . shall . . . be stayed . . . unless, in the opinion of the court, the ability of the plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." *Id.*

¹⁸⁰319 U.S. 561, 569 (1943). "The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced. . . ." *Id.*

¹⁸¹ Compare *Palo v. Palo*, 299 N.W.2d 577 (S.D. 1980) (soldier makes no showing of military exigency precluding appearance) with *Lackey v. Lackey*, 278 S.E.2d 811 (Va. 1981) (sailor's commanding officer notifies court of deployment to sea and date of availability). Additionally, courts sometimes rule against service members when they find that the service member is not a necessary party to the proceeding. See, e.g., *Bubac v. Boston*, 600 So.2d 951 (Miss. 1992) (father not a necessary part to dispute over custody between mother of child and custodial paternal grandmother); *Shelor v. Shelor*, 383 S.E.2d 895 (Ga. 1989) (temporary child support modification hearing interim in nature and service member-defendant not needed because order was interlocutory and subject to modification at any time).

¹⁸²A review of all reported cases regarding 50 U.S.C. § 520(4) reveals none in which the court holds that a request for a stay constitutes an appearance per se. While some courts have considered both the issue of a stay request and the issue of reopening a default judgment, none have concluded that requesting a stay under 50 U.S.C. § 521, by itself, constitutes an appearance within the meaning of 50 U.S.C. § 520(4). This particular issue, however, deserves considerable research and will be the subject of a future article.

¹⁸³See, e.g., *Skates v. Stockton*, 683 P.2d 304, 305 (Ariz. Ct. App. 1984) (letter from legal assistance attorney reserving appearance under SSCRA but failing to reserve personal jurisdiction was an appearance and consent to jurisdiction for purpose of in personam jurisdiction.) See also DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-7f.(2)(b) (30 Sept. 1992) (caution to legal assistance attorneys that a letter requesting a stay may have the inadvertent result of consenting to jurisdiction).

¹⁸⁴1995 WL 265047 (Minn. Ct. App. 1995).

¹⁸⁵*Id.*

¹⁸⁶*Id.* at *4 n.4.

¹⁸⁷*Id.*

¹⁸⁸Attorneys should place text in any correspondence that denies appearance under 50 U.S.C. § 520, reserves all defenses, and reserves all special defenses.

¹⁸⁹455 S.E.2d 306, (Ga. Ct. App. 1995).

¹⁹⁰*Id.* at 591. Massey sought to have all discovery delayed until completion of his overseas tour. Although the plain text of the statute allows such an indefinite delay, it is often an unreasonable request, particularly in peacetime, when a soldier can request leave and (potentially) obtain space available transportation to the continental United States.

dier asserted that he needed additional time to conduct discovery because he was assigned to Europe.¹⁹¹ The trial court denied his motion, finding inter alia that there had been significant improvements in trans-Atlantic communications since the 1940 passage of the SSCRA.¹⁹²

From a practical standpoint, the decision of the court is not all that extreme. Realistically, a soldier in Europe would have little difficulty responding to written interrogatories in a civil matter. Additionally, other new technologies, both existing and envisioned, should make this communication easier. For

instance, video teleconferencing could provide a simple (albeit expensive) replacement for video deposition. Furthermore, electronic mail can provide an almost instantaneous transmission of secure information from Europe to America. Consequently, soldiers may have to show, in the near future, not only why they could not return to the continental United States, but why they could not communicate with the court by one of those alternate means. Judge advocates need to keep these alternate forms of communication in mind when advising clients and preparing requests for a stay of proceedings. Major McGillin.

¹⁹¹ *Id.* at 592.

¹⁹² *Id.* at 592-93.

Claims Report

United States Army Claims Service

Personnel Claims Notes

A Properly Documented POV Claims File

Guidance provided in *Department of Army Regulation (AR) 27-20*,¹ paragraph 11-35, provides that "after payment of a claim involving a POV, if there is evidence of ocean carrier liability, the entire claim file will be forwarded to the Military Sealift Command, Atlantic." The Military Sealift Command (MSC) has advised the United States Army Claims Service that field claims offices often forward POV claims files that have problems with documentation. For example, a copy of the destination DD Form 788, the copy that reflects all of the contractors that came in contact with the POV from origin to destination, is missing from the file, or the documents in the POV claims files are not properly photocopied. Because of these kinds of errors, the MSC cannot effectively pursue recovery against the appropriate ocean carrier.

Field claims offices should make every effort to obtain a copy of the destination DD Form 788, especially when it identifies the ocean carrier, and ensure that copies of documents are properly photocopied before mailing the claims files to the

MSC for ocean carrier recovery. Lieutenant Colonel Kennerly.

Missing Packed Items: A Trumpet Missing from a Carton of Games, Jewelry Missing from a Jewelry Box

In *Andrews Van Lines, Inc.*, The Comptroller General affirmed carrier liability for a trumpet missing from a 4.5 cubic foot carton described on the inventory as "Games."² Andrews denied liability, contending there was no proof of tender for a trumpet, and thus, no prima facie case of carrier liability. Andrews maintained that a trumpet would not be packed with games, and the owner failed to show that the item was packed with games.

The Comptroller General held that sufficient documentary evidence existed to establish tender of the trumpet to the carrier. Proof of ownership was shown by evidence that the trumpet had been damaged in a move one year earlier. The soldier presented copies of a DD Form 1844 from the previous move in which he claimed that his trumpet was dented and a repair bill for the dented trumpet. The soldier also provided a personalized handwritten statement describing how

¹ DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS (28 Feb. 1990).

² *Andrews Van Lines, Inc.*, B-257398, Dec. 29, 1994 (unpub.).

the trumpet was packed in its own case, which also contained a music holder and a mouth piece. He indicated that the carrier packed his trumpet in its case along with his son's toys and provided a statement that he checked all of the rooms in his home after the packers had departed and nothing was left behind. Everything had been tendered to the carrier.

The Comptroller General indicated that not every household good needs to be listed on the inventory. A carrier can be charged with loss when other circumstances are sufficient to establish that the goods were shipped and lost. The Comptroller General also noted that it would not be unusual for a carrier to pack a trumpet with other entertainment articles such as games.

The question remains, "How much evidence is necessary to convince the Comptroller General that a packed item was tendered, but not delivered?" The answer is, "As much evidence as the claimant can reasonably muster to establish ownership and tender to the carrier." Claims personnel should consider the following questions:

- Does the claimant have proof of purchase or ownership?
- Can the claimant provide register receipts, cancelled checks, credit card statements, or photographs that establish ownership before the move?
- Are there statements from witnesses who knew the claimant before the move and can verify that they saw the claimant own and use the missing item?
- Is there any evidence of carton tampering?
- Is the inventory description reasonably related to the missing item?
- Has the claimant provided a signed, personalized, detailed statement explaining how the claimant knew the missing item was tendered to the carrier?
- Did the claimant speak to the carrier about the item?
- Was the item located in a special room?
- Did the claimant see the carrier pack the missing item?

- What particular memories does the claimant have that can establish that the item was tendered?

Do not overlook the importance of the claimant's written statement. It should be detailed and personalized, with specific examples if possible, establishing tender of the missing item to the carrier. Field claims offices are in the best position to obtain these statements while the claimant is still assigned to the installation. When warranted, field claims offices should make it a matter of office procedure to ask claimants to prepare such a statement.

This decision illustrates several types of evidence that the Comptroller General will accept as proof of tender. If a field claims office ensures that this documentation is in the files when tender of an item is at issue, the Army should be successful when a carrier contends that the item in question was not tendered.

On the other hand, even though the Army was successful in obtaining recovery for the missing trumpet, other missing high value items such as jewelry are not always recovered. In a recent case submitted to the Claims Group of the General Accounting Office (GAO), a Settlement Certificate was issued denying recovery for missing jewelry.³ Engagement and wedding rings were packed in ring boxes inside a jewelry box. The inventory reflected a 4.5 cubic foot carton containing a "jewelry box." The jewelry box was delivered, the ring boxes were there, but the rings were missing. The shipper provided a picture of herself wearing the rings and a detailed explanation as to why she was not wearing the rings at the time of shipment. These rings were from a former marriage. The shipper was remarried and had not worn the engagement and wedding rings since 1984. She was keeping these rings for her son for his use when he grew up. The Army paid the shipper \$789 for the two rings.

The carrier denied liability contending that there was no proof of tender for the rings. It acknowledged tender of a jewelry box, but denied that the jewelry box had contents. It further maintained that it had no liability for items of extraordinary intrinsic value unless the shipper advised the carrier of their existence at the time the inventory was prepared. The carrier also indicated there was no proof of purchase.

In our legal memorandum to the GAO defending our offset action, we noted that the Comptroller General consistently upheld offset for items missing from reasonably related cartons, such as a waterpik missing from a carton of bathroom items and a quilt missing from a carton of linens.⁴ Rings missing from a carton labeled jewelry box, fit this category of

³GAO Settlement Certificate, Z-2817671 (70) (Mar. 22, 1995).

⁴Cartwright Van Lines, B-241850.2, Oct. 21, 1991 (unpub.).

reasonably related items. We noted that the shipper provided a photograph establishing ownership and that she provided a reasonable explanation as to why the rings were not on her finger at the time of the move. Fair replacement prices from an AAFES catalogue were provided for the two rings. We also indicated the analogy between tools missing from a tool box and jewelry missing from a jewelry box. We noted that in *American Vanpac Carriers*, the Comptroller General upheld the reasonable inference that a tool box tendered to the carrier contained tools.⁵ We maintained that the same logic applied to a jewelry box.

The GAO's Settlement Certificate denied recovery and ordered us to return \$789 to the carrier. It maintained there was no proof of tender for the missing rings. The GAO indicated that the shipper should have informed the carrier that the rings would be shipped and that items of intrinsic value—such as the missing rings—should be noted on the inventory.

The Army informed the GAO Claims Group that the Tender of Service does not contain any obligation for the shipper to tell the carrier at the time of shipment that expensive high value items are included in the shipment.⁶ The GAO responded that it intended to scrutinize missing high value items, such as jewelry, and would demand actual proof of tender. The GAO also indicated that these items must be listed on the inventory.

The question remains, when do we pay for packed missing expensive jewelry and other small items that are not specifically annotated on the inventory? The answer is not often, unless the claim is extremely well substantiated and there is actual proof of tender.

At the time of the shipper's counseling at the transportation office, the shipper should be informed that jewelry and other small expensive items should be hand carried to avoid the situation discussed above.⁷ However, if expensive jewelry or other expensive items are to be included in the shipment, the shipper must insure that each item is *individually recorded* on the inventory. If the carrier declines to do this, the shipper should add this information to the "Remarks/Exception" section found at the bottom of each inventory page. If a jewelry box is tendered, the shipper should indicate the inventory

number for the jewelry box and specifically describe each item of value within the jewelry box in the "Remarks/Exception" section. Occasionally, some carriers, in addition to the normal household goods inventory, prepare a high value inventory to reflect tender of expensive items. The shipper should make sure that all the expensive items are listed and well described on this separate inventory. Before signing the inventory at delivery, the shipper also should verify that these items were delivered.

For the Army to recover against the carrier for missing high value items, such as expensive jewelry, we need proof of tender. The best proof is a description of each item on the inventory. There should also be receipts establishing purchase, an explanation of how the owner acquired the property, or pictures showing use prior to shipment. The mere listing of a jewelry box will no longer sufficiently establish loss for expensive items missing from the jewelry box. Ms. Schultz.

Claims Note

Disaster Claims—Claims for Emergency Response Services

In case of a disaster associated with an Army installation—whether it is a natural disaster (hurricane, flood, fire, or tornado) or manmade (aircraft crash, chemical, nuclear, or conventional weapons accident)—civilian emergency response personnel and equipment could be called on to help the installation cope with the disaster. This note will examine whether claims against the Army by state and local governments and private individuals for costs incurred for emergency response actions are compensable under the Federal Torts Claims Act (FTCA)⁸ or Military Claims Act (MCA)⁹ in the aftermath of a man-made disaster caused by military or civilian government employees.¹⁰ Alternate sources of recovery also are briefly discussed.

Federal Tort Claims Act Claims

The FTCA vests the United States district courts with jurisdiction over actions against the United States for money damages due to personal injury or property damage caused by the negligent or wrongful acts or omissions of federal employees acting in the scope of employment.¹¹ The issue in disaster

⁵ *American Vanpac Carriers*, B-247876, Aug. 24, 1992 (unpub.).

⁶ DEP'T OF DEFENSE, DOD 4500.34-R, PERSONAL PROPERTY TRAFFIC MANAGEMENT REGULATION, app. A (Oct. 1990).

⁷ Personnel Claims Notes, *Claims Information and the Installation Transportation Office Outbound Shipping Counselor*, ARMY LAW., Mar. 1995 at 56.

⁸ 28 U.S.C. §§ 1346, 2671-2680.

⁹ 10 U.S.C. § 2733.

¹⁰ If the disaster results from natural causes, then a noncontractual claim against the Army would not be expected. See *infra* note 24 and accompanying text.

¹¹ 28 U.S.C. § 1346. See also DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS, para. 4-2 (15 Dec. 1989) [hereinafter DA PAM. 27-162].

relief is whether emergency response costs are "injury or loss of property, or personal injury or death" within the meaning of the FTCA.¹² There are relatively few published cases on point, but they all consistently hold that emergency response costs per se are not compensable under the FTCA.

In *California v. United States*,¹³ a federal employee acting within the scope of employment negligently caused a fire to escape to federal lands. State of California firefighters responded to the fire and the state filed an administrative claim and then suit under the FTCA to recoup the state's firefighting expenses. California law made the federal employee's actions tortious and statutorily provided for liability against the person who caused the fire for the expenses of fighting the fires, "collectible by the person or by the federal, state, county, or private agency, incurring (the firefighting) expense."¹⁴ The United States Court of Appeals for the Ninth Circuit (Ninth Circuit) noted an absence of any litigation where FTCA recovery was allowed without actual injury to person or property, and affirmed the district court in its dismissal of the action.

In *Oregon v. United States*,¹⁵ the Ninth Circuit addressed the same issues that it had faced in the California case. Oregon had similar statutes that created tort liability and debt for actual costs for controlling or extinguishing a fire. The Ninth Circuit again held that an essential element of a FTCA complaint was absent, because there was no injury or loss of property, and accordingly, the court lacked jurisdiction under the FTCA.

In *Idaho ex rel. Trombley v. United States Department of Army, Corps of Engineers*,¹⁶ the state of Idaho and the United States Army Corps of Engineers entered a fire suppression agreement in which the United States agreed to pay an annual fee in return for Idaho's obligation to provide fire suppression on federal lands. A fire was started by campers at a minicamp located on federal land, and it later spread to state lands. It was never determined what caused the fire to spread, but Idaho alleged negligence by both the United States and the contractor who built the minicamp. Idaho spent \$150,000 to

extinguish the fire on state lands. Despite the plaintiff's attempt to classify the expenses as "mitigation damages," the Ninth Circuit held that the firefighting expenses did not constitute "money damages . . . for injury or loss of property" under the FTCA, and dismissed the case for lack of jurisdiction without having to resolve the State's case on its merits.

In *Charles Burton Builders, Inc. v. United States*,¹⁷ a United States Coast Guard contractor improperly, and in violation of Maryland law, disposed of batteries which contained hazardous substances. Plaintiff, a neighbor, incurred expenses to test for contamination. However, the test showed the illegal dumping was not the cause of any physical damage to plaintiff's adjacent property. Plaintiff filed a claim and then a suit under the FTCA for the test costs. The district court noted that Ninth Circuit precedent never had been refuted. The district court found that "all existing authority is consistent with these holdings and the concept that a plaintiff cannot recover under the FTCA for indirect claims or 'response' costs."¹⁸ The district court further rejected the plaintiff's contention that because the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹⁹ specifically allows recovery for response costs, a cause of action for such items should be allowed under the FTCA.

An unpublished case that received some notoriety recently is *County Commission of Morgan County, West Virginia v. United States*.²⁰ A West Virginia Air National Guard airplane crashed, causing substantial property damage and a release of hazardous materials at the crash site. County officials complied with requests to assist in containment and clean up at the crash site. The county incurred \$9191 in clean up costs and \$1694 in overtime pay for its deputy sheriffs. The district court rejected the FTCA suit to recover clean up expenses and overtime, holding that it did not constitute money damages for injury to or loss of property and was not cognizable under the FTCA. Press reports reflect, however, that after national publicity resulting from the county closing its air space to the Air Force and the Air National Guard, the county eventually was reimbursed on contractual grounds.

¹²28 U.S.C. §§ 1346(b), 2672.

¹³307 F.2d 941 (9th Cir. 1962).

¹⁴*Id.* at 942.

¹⁵308 F.2d 568 (9th Cir. 1962), *cert denied*, 372 U.S. 941 (1963).

¹⁶666 F.2d 444 (9th Cir. 1982), *cert denied*, 459 U.S. 823 (1982).

¹⁷768 F. Supp. 160 (D. Md. 1991).

¹⁸*Id.* at 163.

¹⁹42 U.S.C. §§ 5121-5202.

²⁰No. 3-93CV64 (N.D. W. Va. 23 Nov. 1994).

Where state and local governments or private parties only seek to recover response costs and not actual property damage from the government's alleged negligence, recovery will not be allowed under the FTCA. On the other hand, authority exists that if contamination causes actual property damage, and thus a valid cause of action under the FTCA, the cost of removing the contamination may be considered a measure of damages to the property.²¹

Military Claims Act Claims

Although the FTCA preempts other federal statutes when the claim is based on a tort committed in the United States by a service member or civilian federal employee, the MCA applies to tortious acts by military members overseas, and applies to losses caused by noncombat activities of the military not based on tort. However, the MCA, just as the FTCA, requires damage to, or loss of, property, or personal injury or death. If the claim is for emergency response costs, then the same analysis that the courts have applied to the FTCA should be applied to MCA cases. Under this analysis, emergency response costs are not actual property loss or damage and are not compensable under the provisions of the MCA. The new revision to AR 27-20 clarifies this issue: "[Property damage] claims are limited to loss of tangible property and costs directly related thereto. Consequential damages are not included, for example: . . . public fire suppression, police response, or other governmental emergency response costs."²²

Other Possible Sources of Recovery

Even though emergency response claims per se are not payable under the FTCA or the MCA, claimants may have other means available to seek compensation. For example:

- State and local firefighters may be entitled to emergency response costs for fires on property under federal property jurisdiction under a federal statute that does not

base compensation on any fault of the federal government in causing the fire.²³

- Local emergency response agencies called by the Army to assist in dealing with an emergency created by the Army may be entitled to compensation as a procurement action, whether or not there is a contract or a mutual support agreement with the installation in place in advance.²⁴

- If a situation results in a major disaster or emergency declaration by the President under the Stafford Act,²⁵ Federal Emergency Management Agency (FEMA) regulations control the reimbursement of the emergency response costs through grant, loan, or cost sharing.²⁶ The Army claims system plays no part in the payment or reimbursement for emergency response services under the FEMA regulations, and these claims should be referred to the FEMA.

- In the event an emergency response is made to a hazardous release, costs to respond to the contamination may be payable under the CERCLA,²⁷ and claims arising from a release on a military installation²⁸ may be processed under the Defense Environmental Restoration Program (DERP) and payable under the Defense Environmental Restoration Account (DERA).²⁹ Activities that may be eligible for DERP funding include: "immediate actions necessary to address health and safety concerns . . . when the hazard results or has reasonably been determined to result from a release from property either controlled by the Army or

²¹ *New York v. United States*, 620 F. Supp. 374, 378 (D.C.N.Y. 1985); *but see Kosak v. United States*, 465 U.S. 848, 852-53 (1984), where, in dicta, the Supreme Court cites the *Trombley* and questions whether consequential damages are coverable by the FTCA in light that the FTCA permits recovery only of money damages for injury or loss of property.

²² AR 27-20, *supra* note 1, para. 3-8d(1).

²³ 15 U.S.C. § 2210.

²⁴ DA PAM. 27-162, *supra* note 11, para. 8-66.

²⁵ 42 U.S.C. §§ 5121-5202.

²⁶ See generally 44 Fed. Reg. pt. 206.

²⁷ 42 U.S.C. §§ 9601-9675.

²⁸ 40 Fed Reg. 300.175(b)(4).

²⁹ See 10 U.S.C. §§ 2101-2107; DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, para. 9-4 (23 Apr. 1993) [hereinafter AR 200-1].

formerly used by DOD.”³⁰ The President has delegated authority to adjudicate CERCLA emergency response claims to the Environmental Protection Agency (EPA) under Executive Order 12,580.³¹ The EPA has claims procedures for use by commercial entities and individuals³² and other procedures applicable to reimbursements sought by local governments.³³ Both EPA regulations require the claimant to first pursue reimbursement from the responsible party, so if the

release occurred on a military installation, the claimant should first make a demand on the Army.³⁴ If such a demand is received by an Army field claims office, forward it to the USARCS so that it can be coordinated with the Environmental Law Division, Office of The Judge Advocate General, or the Army and DOD General Counsels.

Lieutenant Colonel Millard.

³⁰ AR 200-1, *supra* note 29, para. 9-4b(1)(i); *see also* DA PAM. 27-162, *supra* note 11, paras. 8-68 to 8-70.

³¹ 43 Fed. Reg. 47,707 (1978).

³² 40 Fed. Reg. 307.

³³ *Id.*

³⁴ Under the National Contingency Plan, 40 Fed. Reg. pt. 300, at 300.175(b)(4), “The Department of Defense (DOD) has responsibility to take all action necessary with respect to releases where the sole source of the release is from any facility or vessel under the jurisdiction, custody, or control of DOD.”

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

Reserve Component Promotion Update

Paragraph 4-11 of *Army Regulation (AR) 135-155*¹ states “Each Ready Reserve officer is required to undergo a medical examination (*AR 40-501*) at least once every 4 years.” However, Interim Change 103 to *AR 40-501* has extended the interval for physical examinations to *five years*. This interim change expires 13 March 1996. Dr. Foley.

Outstanding Career Armed Services Attorney Awards Program

The following press release was issued by the Judge Advocates Association to announce the creation of two new annual awards for Reserve Component officers. Both United States Army Reserve and National Guard officers are eligible to be nominated for these awards. Nominations must reach the Judge Advocates Association no later than 1 September 1995. Captain Storey.

Press Release

Nicholas Grasselli, President of the Judge Advocates Bar Association, announced the creation of an annual “Outstanding Career Armed Services Attorney” awards program for

judge advocates or law specialists serving in the Reserve or National Guard. The Association, founded in 1943, is the only national bar association dedicated solely to the practitioner of military and veteran related law.

“There are many award and recognition programs by the various bar associations for the active duty military lawyer,” said Grasselli, “However the tremendous contributions made by drilling Reserve or Guard attorneys have not been sufficiently highlighted. The Judge Advocates Bar Association hopes to remedy that with this awards program.” President Grasselli acknowledged the significant role Reserve and Guard attorneys played during Operation Desert Storm and the much needed support they provide to the active components in this time of manpower drawdowns.

There will be two awards in each of the five Armed Services Reserve/Guard elements in each fiscal year: the Senior Attorney Award, for grades O-6 and O-5; and the Junior Attorney Award, for grades O-3 and O-4. The awards will be presented during the year at various Reserve legal symposiums across the country. For more information or a nomination packet, call Ms. Maggie Sullivan at the Judge Advocates Bar Association at (202) 628-0979.

¹ DEP'T OF ARMY, REG. 135-55, ARMY NATIONAL GUARD AND ARMY RESERVE: PROMOTION OF COMMISSIONED OFFICERS AND WARRANT OFFICERS OTHER THAN GENERAL OFFICERS (1 Sept. 1994).

Personnel, Plans, and Training Office Notes

Personnel, Plans, and Training Office, OTJAG

Enrollment of Pregraduate Course Majors in Nonresident Command and General Staff College (CGSC)

Ordinarily, an officer must be a graduate of an officer advanced course to enroll in nonresident CGSC.¹ For judge advocates who have not completed the Judge Advocate Officer Graduate Course (Graduate Course), The Judge Advocate General (TJAG) will consider requests for waiver of this requirement under the following circumstances:

- (1) Officer must be serving in the grade of major and meet the height and weight standards of *Army Regulation 600-9*;
- (2) Officer must be a graduate of the Combined Arms and Services Staff School (CAS³) at the time of the submission of the request for waiver;
- (3) Officer must have been eligible for assignment to the Graduate Course and have been operationally deferred by the Chief, Personnel, Plans, and Training Office (PP&TO) for one or more years—an officer who has voluntarily deferred attendance at the Graduate Course will not be eligible to receive a waiver; and

(4) Officer, as determined by PP&TO, must have less than thirty-six months from the projected date of graduation from the Graduate Course to the date that he or she will be considered in the primary zone for promotion to lieutenant colonel.

Officers who believe that they qualify for a waiver should submit a request in memorandum format detailing their eligibility and forward it through their staff judge advocates or supervisory judge advocates to:

Office of The Judge Advocate General
ATTN: DAJA-PT (Room 2E443)
2200 Army Pentagon
Washington, DC 20310-2200

Requests for waiver recommended for approval by TJAG will be forwarded to the Director of Army Training, Office of the Deputy Chief of Staff for Operations and Plans (DAMO-TR), for final approval. If the waiver is granted, the School of Corresponding Studies at Fort Leavenworth, Kansas, will be instructed to enroll the officer in nonresident CGSC. Direct questions on this matter to Lieutenant Colonel Odegard or Major (P) Miller, commercial: (703) 695-1353; DSN: 225-1353. Major Cullen.

¹ DEP'T OF ARMY, PAMPHLET 351-20, SCHOOLS: ARMY CORRESPONDENCE COURSE PROGRAM CATALOG, para. 4-62d (1 Apr. 1995).

Regimental News from the Desk of the Sergeant Major

Sergeant Major Jeffrey A. Todd

Career Progression

As soldiers, our careers begin from the first oath of enlistment and every reenlistment thereafter. Some soldiers will progress to the rank of Staff Sergeant and will be satisfied with that progression, while others will not. Some may be totally satisfied that they have received an Army Achievement Medal for an end of tour award, while others strive for, and attain, a Meritorious Service Medal. Some work late into the night or on weekends without complaint, while others spend

time away from the office or work place because they choose to. Career progression (or how far one wants to go in any walk of life) is coupled directly with a soldier's attitude, motivation, and perseverance to succeed. We all want to be successful, but that level of success is again attributed directly to the level one desires to obtain.

In my opinion, there are two types of soldiers in our Army . . . those who constantly strive to make the cut-off score and those who wait for the cut-off score to drop to their level;

those who strive to make 290 points on the APFT, and those who settle for 180; those who actively compete before Non-commissioned (NCO)/Soldier of the Month Boards and those who decline to; those who continue their military education by enrolling and subsequently completing correspondence courses and those who have a pocket full of excuses why they cannot. We have soldiers who will not let a permanent or temporary profile stand in their way—all they want is the chance to succeed.

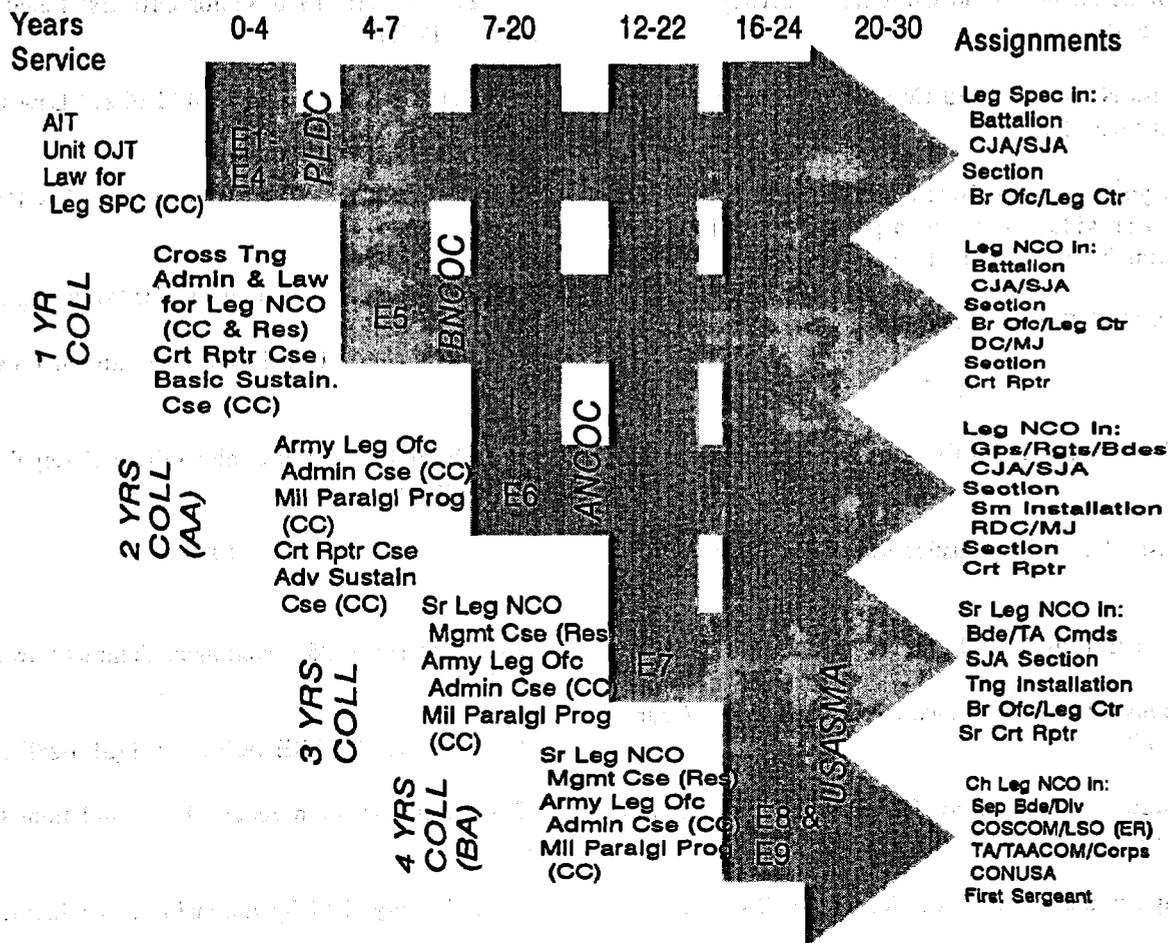
My guidance to the Judge Advocate General's Corps' senior NCO leadership is simple . . . allow our soldiers to grow and become successful. Growing and maturing within our military occupational specialty (MOS) means working in all the aspects of our MOS from criminal law to legal assistance to trial defense service to claims to operational law to administration law—from a battalion to a brigade to a division. Growing also includes a mixture of Tables of Distribution and Allowance (TDA) and Tables of Organization and Equipment (TO&E) assignments as opposed to strictly TDA; as opposed to working strictly in one facet of our MOS for lengthy periods of time while one's last five NCO-Evaluation Reports reflect just that. I can tell you from experience we are neither

providing favors nor career enhancement to our soldiers by continuous work in criminal law because they are exceptional criminal law NCOs . . . you have got to move them to other areas of the SJA Office after a reasonable amount of time to expand their knowledge of our MOS, which makes them more competitive for promotion and enhances career progression.

To assist you in this endeavor is a career map that we have developed over the years depicting the assignments that our soldiers should have, to include various levels of military education. Although this career map is not all inclusive, it is a good guideline and a part of the proponenty briefing that we send to board members who sit on Centralized Promotion Boards (SFC-SGM). I ask that you share this career map with your soldiers and discuss its content during your next regularly scheduled Sergeant's Time Training.

Overall, our enlisted force is healthy and competitive but there is room for improvement. We must consider that our junior noncommissioned officers of today will be tomorrow's Chief/Senior Legal NCOs. You can make a difference by helping them reach higher levels of leadership and responsibility . . . helping them with career progression.

71D and 71DC5 Career Development Model



1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those students who have a confirmed reservation. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

**Course Name—133d Contract Attorneys
5F-F10**

**Class Number—133d Contract Attorneys'
Course 5F-F10**

To verify you have a confirmed reservation, ask your training office to provide you a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1995

31 July-11 August: 135th Contract Attorneys Course (5F-F10).

1-4 August: 1st Military Justice Management Course (5F-F31).

14-18 August: 13th Federal Litigation Course (5F-F29).

14-18 August: 6th Senior Legal NCO Management Course (512-71D/40/50).

21-25 August: 131st Senior Officers Legal Orientation Course (5F-F1).

21-25 August: 60th Law of War Workshop (5F-F42).

28 August-1 September: 22d Operational Law Seminar (5F-F47).

6-8 September: USAREUR Legal Assistance CLE (5F-F23E).

11-15 September: USAREUR Administrative Law CLE (5F-F24E).

18-29 September: 4th Criminal Law Advocacy Course (5F-F34).

2-6 October: 1995 JAG Annual Continuing Legal Education Workshop (5F-JAG).

10-13 October: 2d Ethics Counselors' CLE Workshop (5F-F201).

16-20 October: USAREUR Criminal Law CLE (5F-F35E).

16-20 October: 37th Legal Assistance Course (5F-F23).

16 October-21 December: 138th Basic Course (5-27-C20).

23-27 October: 132d Senior Officers' Legal Orientation Course (5F-F1).

30 October-3 November: 43d Fiscal Law Course (5F-F12).

13-17 November: 19th Criminal Law New Developments Course (5F-F35).

13-17 November: 61st Law of War Workshop (5F-F42).

4-8 December: USAREUR Operational Law CLE (5F-F47E).

4-8 December: 133d Senior Officers' Legal Orientation Course (5F-F1).

1996

8-12 January: 1996 Government Contract Law Symposium (5F-F11).

9-12 January: USAREUR Tax CLE (5F-F28E).

22-26 January: 48th Federal Labor Relations Course (5F-F22).

22-26 January: 23d Operational Law Seminar (5F-F47).

31 January-2 February: 2d RC Senior Officers Legal Orientation Course (5F-F3).

5-9 February: 134th Senior Officers' Legal Orientation Course (5F-F1).

5 February-12 April: 139th Basic Course (5-27-C20).

12-16 February: PACOM Tax CLE (5F-F28P).

12-16 February: 62d Law of War Workshop (5F-F42).

12-16 February: USAREUR Contract Law CLE (5F-F18E).

26 February-1 March: 38th Legal Assistance Course (5F-F23).

4-15 March: 136th Contract Attorneys' Course (5F-F10).

18-22 March: 20th Administrative Law for Military Installations Course (5F-F24).

25-29 March: 1st Contract Litigation Course (5F-F102).

1-5 April: 135th Senior Officers' Legal Orientation Course (5F-F1).

15-19 April: 1996 Reserve Component Judge Advocate Workshop (5F-F56).

15-26 April: 5th Criminal Law Advocacy Course (5F-F34).

22-26 April: 24th Operational Law Seminar (5F-F47).

29 April-3 May: 44th Fiscal Law Course (5F-F12).

29 April-3 May: 7th Law for Legal NCOs' Course (512-71D/20/30).

13-17 May: 45th Fiscal Law Course (5F-F12).

13-31 May: 39th Military Judge Course (5F-F33).

20-24 May: 49th Federal Labor Relations Course (5F-F22).

3-7 June: 2d Intelligence Law Workshop (5F-F41).

3-7 June: 136th Senior Officers' Legal Orientation Course (5F-F1).

3 June-12 July: 3d JA Warrant Officer Basic Course (7A-550A0).

10-14 June: 26th Staff Judge Advocate Course (5F-F52).

17-28 June: JATT Team Training (5F-F57).

17-28 June: JAOAC (Phase II) (5F-F55).

1-3 July: Professional Recruiting Training Seminar.

1-3 July: 27th Methods of Instruction Course (5F-F70).

8-12 July: 7th Legal Administrators' Course (7A-550A1).

8 July-13 September: 140th Basic Course (5-27-C20).

22-26 July: Fiscal Law Off-Site (Maxwell AFB) (5F-12A).

24-26 July: Career Services Directors Conference.

29 July-9 August: 137th Contract Attorneys' Course (5F-F10).

29 July-8 May 1997: 45th Graduate Course (5-27-C22).

30 July-2 August: 2d Military Justice Management Course (5F-F31).

12-16 August: 14th Federal Litigation Course (5F-F29).

12-16 August: 7th Senior Legal NCO Management Course (512-71D/40/50).

19-23 August: 137th Senior Officers' Legal Orientation Course (5F-F1).

19-23 August: 63d Law of War Workshop (5F-F42).

26-30 August: 25th Operational Law Seminar (5F-F47).

4-6 September: USAREUR Legal Assistance CLE (5F-F23E).

9-13 September: 2d Procurement Fraud Course (5F-F101).

9-13 September: USAREUR Administrative Law CLE (5F-F24E).

16-27 September: 6th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

September 1995

5-8 ESI: Subcontracting, Washington, D.C.

8 ESI: Sole-Source Contracting, Washington, D.C.

11-15, GWU: Government Contract Law, Seattle, WA.

11-15, ESI: Federal Contracting Basics, Washington, D.C.

18, GWU: Government Contract Compliance: Practical Strategies for Success, Washington, D.C.

18-22, GWU: Formation of Government Contracts, Washington, D.C.

19-22 ESI: Source Selection: The Competitive Proposals Contracting Process, Washington, D.C.

26-29 ESI: Procurement Management, Washington, D.C.

27, ALIABA: 8th Annual Symposium on Intellectual Property Law, Chicago, IL.

27-28, GWU: Government Contract Claims, Washington, D.C.

28, ALIABA: 6th Annual Medical Malpractice Seminar, Houston, TX.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1995 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	1 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually

<u>Jurisdiction</u>	<u>Reporting Month</u>
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth— new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1994 issue of *The Army Lawyer*.

*Military exempt

**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no

charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine-character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

- AD A265755 Government Contract Law Deskbook vol. 1/ JA-501-1-93 (499 pgs).
- AD A265756 Government Contract Law Deskbook, vol. 2/ JA-501-2-93 (481 pgs).
- AD A265777 Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
- AD A263082 Real Property Guide—Legal Assistance/JA-261 (93) (293 pgs).
- AD A281240 Office Directory/JA-267(94) (95 pgs).
- AD B164534 Notarial Guide/JA-268(92) (136 pgs).
- AD A282033 Preventive Law/JA-276(94) (221 pgs).
- AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/ JA-260(93) (206 pgs).
- AD A266177 Wills Guide/JA-262(93) (464 pgs).
- AD A268007 Family Law Guide/JA 263(93) (589 pgs).
- AD A280725 Office Administration Guide/JA 271(94) (248 pgs).

- AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).
- AD A269073 Model Income Tax Assistance Guide/JA 275-93) (66 pgs).
- AD A283734 Consumer Law Guide/JA 265(94) (613 pgs).
- *AD A289411 Tax Information Series/JA 269(95) (134 pgs).
- AD A276984 Deployment Guide/JA-272(94) (452 pgs).
- AD A275507 Air Force All States Income Tax Guide— January 1994.

Administrative and Civil Law

- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
- AD A285724 Federal Tort Claims Act/JA 241(94) (156 pgs).
- AD A277440 Environmental Law Deskbook, JA-234-1(93) (492 pgs).
- AD A283079 Defensive Federal Litigation/JA-200(94) (841 pgs).
- AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).
- AD A283503 Government Information Practices/JA-235(94) (321 pgs).
- AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

- AD A286233 The Law of Federal Employment/JA-210(94) (358 pgs).
- *AD A291106 The Law of Federal Labor-Management Relations/JA-211(94) (430 pgs).

Developments, Doctrine, and Literature

- AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

- AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).
- AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).
- AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).

AD A274628 Senior Officers Legal Orientation/JA 320(94).
(297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook/
JA 310(93) (390 pgs).

AD A274413 United States Attorney Prosecutions/JA-338
(93) (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook/JA 422(94) (273
pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies
Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through
DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investiga-
tions, Violation of the U.S.C. in Economic
Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for
government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

*Obtaining Manuals for Courts-Martial, DA Pamphlets,
Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center
(USAPDC) at Baltimore stocks and distributes DA publica-
tions and blank forms that have Army-wide use. Its address
is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part
of the publications distribution system. The following extract
from *Department of the Army Regulation 25-30, The Army
Integrated Publishing and Printing Program*, paragraph 12-7c
(28 February 1989), is provided to assist Active, Reserve, and
National Guard units.

The units below are authorized publica-
tions accounts with the USAPDC.

(1) *Active Army.*

(a) *Units organized under a PAC.* All units
organized under a PAC that supports battalion-size units will
request a consolidated publications account for the entire
battalion except when subordinate units in the battalion are
geographically remote. To establish an account, the PAC
will forward a DA Form 12-R (Request for Establishment of a
Publications Account) and supporting DA 12-series forms
through their DCSIM or DOIM, as appropriate, to the
Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD
21220-2896. The PAC will manage all accounts established
for the battalion it supports. (Instructions for the use of
DA 12-series forms and a reproducible copy of the forms
appear in DA Pam 25-33.)

(b) *Units not organized under a PAC.* Units that are
detachment size and above may have a publications account.
To establish an account, these units will submit a DA Form
12-R and supporting DA 12-series forms through their
DCSIM or DOIM, as appropriate, to the Baltimore USAPDC,
2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations,
and combat divisions.* These staff sections may establish a
single account for each major staff element. To establish an
account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants
general.* To establish an account, these units will submit a
DA Form 12-R and supporting DA 12-series forms through their
State adjutants general to the Baltimore USAPDC, 2800 Eastern
Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff
sections from division level and above.* To establish an
account, these units will submit a DA Form 12-R and supporting
DA 12-series forms through their supporting installation and
CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard,
Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions
will submit a DA Form 12-R and supporting DA 12-series
forms through their supporting installation and TRADOC DCSIM
to the Baltimore USAPDC, 2800 Eastern Boulevard, Balti-

more, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic bulletin board service (BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve, or NG enlisted personnel (MOS 71D/71E);

(f) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(g) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g. DLA, CHAMPUS, DISA, Headquarters Services Washington);

(h) Individuals with approved, written exceptions to the access policy.

Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
Attn: LAAWS BBS-SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

(2) DOD-wide access to the LAAWS BBS currently is restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files from the LAAWS BBS.*

(1) Log onto the LAAWS BBS using ENABLE, PRO-COMM, or other telecommunications software, and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when asked to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed" and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging onto the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete, the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that

the date **UPLOADED** is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
ALLSTATE.ZIP	January 1994	1994 AF AllStates Income Tax Guide for use with 1993 state income tax returns, January 1994.
ALAW.ZIP	June 1990	<i>Army Lawyer/Military Law Review Database</i> ENABLE 2.15. Updated through the 1989 <i>Army Lawyer Index</i> . It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF .
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.ZIP	January 1994	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in Word-Perfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.

FILE NAME	UPLOADED	DESCRIPTION
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FOIAPT.2.ZIP	June 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB .
JA200A.ZIP	August 1994	Defensive Federal Litigation—Part A, August 1994.
JA200B.ZIP	August 1994	Defensive Federal Litigation—Part B, August 1994.
JA210.ZIP	November 1994	Law of Federal Employment, September 1994.
JA211.ZIP	January 1994	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, February 1994.
JA235.ZIP	August 1994	Government Information Practices Federal Tort Claims Act, July 1994.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.

FILE NAME	UPLOADED	DESCRIPTION	FILE NAME	UPLOADED	DESCRIPTION
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.	JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA262.ZIP	April 1994	Legal Assistance Wills Guide.	JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA263.ZIP	August 1993	Family Law Guide, August 1993.	JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.
JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part A, May 1994.	JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part B, May 1994.	JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA267.ZIP	July 1994	Legal Assistance Office Directory, July 1994.	JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.	JA422.ZIP	May 1995	OpLaw Handbook, June 1995.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.	JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.
JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.	JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.	JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.	JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA275.ZIP	August 1993	Model Tax Assistance Program.	JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.
JA276.ZIP	July 1994	Preventive Law Series, July 1994.	JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA281.ZIP	November 1992	15-6 Investigations.	JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA285.ZIP	January 1994	Senior Officers Legal Orientation Deskbook, January 1994.			

<i>FILE NAME</i>	<i>UPLOADED</i>	<i>DESCRIPTION</i>	<i>FILE NAME</i>	<i>UPLOADED</i>	<i>DESCRIPTION</i>
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.	JA509-1.ZIP	February 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.	JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.	JAGSCHL.WPF	March 1992	JAG School report to DSAT.
JA506-1.ZIP	November 1994	Fiscal Law Course Deskbook, Part 1, October 1994.	YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
JA506-2.ZIP	November 1994	Fiscal Law Course Deskbook, Part 2, October 1994.	YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
JA506-3.ZIP	November 1994	Fiscal Law Course Deskbook, Part 3, October 1994.	YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.	YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.	YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.			
1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.			
1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2, 1994.			
1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.			
1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.			

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

g. Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS

BBS, contact the System Operator, SGT Kevin Proctor, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)(h), above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. Articles

The following information may be of use to judge advocates in performing their duties:

Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL OF RIGHTS J. 629 (1994).

6. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JAGS-DDS, The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

District Counsel,
Kansas City District Corps of Engineers,
Attn: Mrs. Jacques,
700 Federal Bldg.,
Kansas City, MO 64106-2896,
commercial: (816) 426-3945

- AmJur Proof of Facts (vols. 1-30)
- Shepards U.S. Citations
- Federal Digest
- Pacific Digest
- U.S. Supreme Court Reports L.Ed.
- Digest of Opinions (vols. 3-17 Index)
- American Jurisprudence (vols. 1-58)

Department of the Army and Air Force,
National Guard Bureau,
Attn: SSG Keith E. Wayne,
U.S. Property & Fiscal Officer for Maine,
Camp Keyes, Augusta, Maine 04333-0032,
commercial: (207) 626-4527

- United States Code Annotated
 - * Constitution
 - * Title 1-50—Complete Set
 - * Title 5, secs. 1-703, 704-5100, 9501-End
 - * Title 6
 - * Title 10, 3001-5000, 5001-8010, 8011-End
 - * Tables

Headquarters,
U.S. Army Training & Doctrine Command,
TRADOC Contracting Activity,
ATTN: Ms. Lisa Phillips,
ATCA-L, Building 2798,
Fort Eustis, VA 23602-5538,
commercial (804) 878-3568/3703

- Comptroller General Procurement Decisions (vols. 74-79)

Office of Staff Judge Advocate,
HQ, Fort Buchanan,
Attn: Mr. Alfonso M. Christian,
Fort Buchanan, PR 00934-5000,
DSN 740-3345/3965

- Federal Reporter, 2d Series, first 500 volumes

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